

**EXPANDING HORIZONS:  
RETHINKING ACCESS TO JUSTICE IN CANADA**

**PROCEEDINGS OF A SYMPOSIUM ORGANIZED  
BY THE DEPARTMENT OF JUSTICE CANADA  
MARCH 31, 2000**

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**INTRODUCTION**

On March 31, 2000, the Department of Justice Canada hosted a one-day Symposium on access to justice. The Symposium sought to explore the concept of access to justice beyond its conventional boundaries. Participants were asked to rethink traditional views and explore the future challenges of assuring access to justice for Canadians in an increasingly complex and demanding environment.

In this one day of extraordinary dialogue among leading thinkers and practitioners, the Department took the pulse of the justice community about the state of access to justice in Canada. The more than 100 participants were drawn from a broad cross-section of people from all regions of Canada: judges, lawyers, policy specialists, government officials, academics, community representatives, Aboriginal, visible minority and persons with disabilities spokespersons. To ensure that participants could discuss a variety of issues with as many people as possible, each participant was assigned a place at one of 12 mixed tables during the morning plenary session and reassigned to another table during the afternoon session. Participants were free to sign up for any one of four workshops that ran concurrently. A professional conference organiser, Lise Pigeon and Associates facilitated the conference. (The agenda and the list of participants appear in **Appendix A.**)

Throughout the day participants discussed a variety of issues with respect to the state of the access to justice movement in Canada. In general terms the Symposium left participants with one resounding message, quite remarkably, from a large group of leading thinkers from within the justice system and from other areas of human endeavour. The key message was not so much that the justice system – both civil and criminal justice, but especially the criminal justice system – does not work. On that issue there *was* overwhelming agreement. The truly surprising message that emanated forcefully from this “conversation extraordinaire” was that there is a tremendous appetite for change among leaders from both inside and outside the justice system.

The purpose of this report is to summarise the Symposium proceedings and, in the process, identify the key issues that emerged from the presentations and discussions. The report concludes with a brief discussion of seven themes that can act as guideposts toward a more accessible justice system.

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<sup>1</sup> Proceedings prepared by Mr. Marc Thérien.

## BACKGROUND

In preparation for the Symposium, participants were provided with a number of press clippings and three background documents. (The background documents, as well as all of the presentations delivered at the Symposium are reproduced in **Appendix B**) We also received a letter from Ms. Cherry Kingsley from Save the Children-Canada. Ms. Kingsley was unable to attend the Symposium due to prior commitments, and therefore requested that her letter be included in the final Symposium report as a way of providing voice to sexually exploited children and youth in Canada. This letter is reproduced in **Appendix C**.<sup>2</sup>

In a background essay titled “*Citizen Access to Justice: Issues and Trends for 2000 and After*”, **Mark Kingwell**, a philosopher at the University of Toronto, discussed five main trends and issues for access to justice: 1) the growing diversity of Canada; 2) globalization and citizenship; 3) the complex isomorphic relationship between culture and political experience; 4) the role of technology; and 5) the possibility of new forms of citizen action.

Professor Kingwell noted that the growing cultural and ethnic diversity presents special challenges “to make the social and political infrastructure of the country a reflection of the many kinds of people who choose to call themselves Canadian.” As individuals in a rapidly changing society, we “need to make time for reflection, to open up spaces both within ourselves and in our social interactions for thoughts about justice that are not driven, in the first instance, by the imperatives of policy-making or problem-solving.”

*“The project of realizing the basic principles of justice, of guaranteeing all citizens fair access to justice, has lately become vastly more complicated, more challenging, and more confusing.”*

Mark Kingwell

**Ab Currie**, Research and Statistics Division, Department of Justice Canada, prepared the other two background papers. The first of these, “*Some aspects of Access to Justice in Canada*”, identifies the main features and programs of access to justice as they currently exist. They include Legal Aid, Public Legal Education and Information, Court Workers, Court Reform, Alternative Dispute Resolution, Pre-Paid Legal Insurance, Public Interest Advocacy and Pro Bono Services. After reviewing the mechanism for access to the justice system, the author concluded that “our conventional concept of justice and how to achieve it is a reflection of the traditional justice system” and may not in fact correspond to the preferred approaches to achieving justice of minority groups and many ordinary people.

*“...community-based access to justice implies equipping individuals to play a more active role in constructing solutions to their justice problems.”*

Ab Currie

Mr. Currie’s second paper, entitled “*Riding the Third Wave – Notes*

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<sup>2</sup> The proceedings of the Symposium were recorded in the following ways: 1) Note takers were assigned to each of the 12 tables during the morning and afternoon plenary, and two note takers attended each of the four workshops. 2) Presenters provided their speaking notes for inclusion in this Symposium report (reproduced in appendix B).

on the *Future of Access to Justice*”, traced the development and evolution of access to justice towards more recent “holistic” or multidisciplinary approaches. However, reforms of the legal system occur slowly and do not necessarily keep pace with the changing expectations of society. While these newer trends have not replaced traditional system-based approaches, they do seek “more effective and durable solutions to justice problems.” Initiatives fostering greater reliance on community-based access-to-justice services are positive in that they commit “the considerable resources resident in the communities to addressing access to justice issues.”

## WELCOME ADDRESS

**Morris Rosenberg**, the Deputy Minister of Justice and Attorney General of Canada, delivered the opening welcome. He explained why it is important to explore new directions in access to justice at this time:

Today, perhaps more than ever, the traditional justice system is branching out to foster integrated and multi-disciplinary approaches. New and holistic approaches are creating linkages between the justice system and community groups and other institutions to address problems that may have a legal element, but are propelled by a complex of underlying social and economic problems.

Mr. Rosenberg challenged participants to think broadly in order to generate as many “outside the box” ideas as possible in order to identify emerging challenges.

## PANEL DISCUSSION

Following Mr. Rosenberg’s welcoming address, **Gilles Paquet**, Director of the Centre on Governance, University of Ottawa, introduced the three panel members. Mr. Paquet was also charged with providing a synthesis of discussions and an outline of key challenges at the end of the Symposium.

In a presentation titled “*Justice Is a Noun, But Access Isn’t a Verb*”, **Roderick Macdonald**, President of the Law Commission of Canada, explained his key point at the outset:

After 25 years of toiling in the fields of community legal education and access to civil justice, I have one central message. It is this. I once believed that more official top-down law was the only road to more justice. Now I no longer see the challenge in purely instrumental terms. Rather our challenge is much greater. It is to rethink our attitudes and our expectations about who owns law, about what it can realistically accomplish, and about how it can most effectively be deployed to promote a more just society.

He then distilled five short messages drawn from his considerable experience.

1) Information is not always power and public legal education “can be a double- edged sword” which often “winds up enhancing dependency on lawyers, courts and the formal system.”

2) “Law in society” is not the same as “law and society”:

“Law” and “society” are not two different things. Law arises in social interaction. The policy objective cannot be to make the recalcitrant facts of social life conform to the neat patterns of official legal regulation. The exclusion of so many people from the presumed benefits of the legal system flows directly from the inability or refusal of official law enacted by legislatures and administered by courts and tribunals to make space for the living law of everyday human interaction.

3) “Access to courts” is not the same as “access to justice”. The challenge is to “reconceive human conflict in a manner that permits official institutions to replicate the wisdom of unofficial social symbolisms, and unofficial social symbolisms to replicate the democratic and social egalitarian values we ascribe to our official processes.”

4) In considering diversity and disenfranchisement, “the one abiding social differentiator, transcending all other inequalities, is social class.” The challenge is how to create a system that actually keeps questions of identity and diversity alive in its rules, processes, and personnel.”

5) Justice resides in human aspiration and the law is “as much the affair of all Canadians, as it is the business of legislatures, courts and lawyers.” It is essential to provide opportunities for citizens to participate more fully in legislative and administrative processes by which law is made.”

*“Canadians renew the law by living the law, often managing to redress the injustices of an official law that Parliament is unable or unwilling to change.”*

Roderick Macdonald

In concluding, Mr. Macdonald underscored the importance of focussing on the real objective:

The most significant concerns about justice felt by Canadians have little to do with narrowly cast legal rights; they have to do, rather with recognition and respect. And the most significant barriers to access can only be overcome through a re-orientation in the way we think about conflicts, rights, adjudication and all-or-nothing judicial remedies; disparities in social power, and not procedural glitches in the processes of civil litigation, are the root of injustice.

Most contemporary proposals to enhance access to justice are simply the reaction of an official system that fears losing its capacity to control to the various other social institutions and practices of civil society where people negotiate and live their own law. The obsessive quest for official legal solutions means that we are now less inclined, and less able, to

*“We come to focus on ‘access’ to justice rather than on ‘justice’ itself; and while we proclaim ‘access to justice’ as a goal, what we really mean is ‘access to law’.”*

Roderick Macdonald

imagine creative responses to disparities in power, and the challenges of building a just society grounded in deep human affect.

The Honourable Judge **Mary Ellen Turpel Lafond**, a provincial court judge in Saskatoon, Saskatchewan, drew upon her experience on the bench and with Aboriginal issues to suggest that there was considerable anxiety in Western Canada about the quality of justice as it applied to members of our First Nations. There was a need to look more closely and more seriously at the structure of justice and how it accommodates pluralism and diversity and how it reflects the values and aspirations of communities.

The question arises as to whether we have created a “prison industry” or an economy of control within the justice system. In Saskatchewan, for example, a male Aboriginal youth has a greater chance of going to jail than completing high school. In this respect, the formal justice system has failed to address the overarching needs of Aboriginal youth that experience conflict with the law. The system recycles, criminalizes and controls young people from an early age while not engaging them socially. There is a need to think through these questions in structural terms rather than to seek to resolve case by case before the courts. A good example is the issue of sexual abuse among natives. We must get at the roots of the problem if there is to be any true resolution.

Considerable effort and hope have been invested in recent years in implementation of restorative justice schemes. However, ironically, the concept of restorative justice has been promoted without any significant political engagement. Communities have not been given the resources to make the programs work. For example, there are little or no resources for sentencing or healing circles.

The solutions obviously do not lie in greater access to the courts since this is no longer in the minds of most members of the community. Institutional justice is not restorative. We must ask ourselves how we can reconceive justice to replicate social democratic values. But more fundamentally, we must ask ourselves whether we still in fact possess a cohesive vision of community. In the eyes of members of diversity groups even informal justice (for example, small claims courts) reflects the white male dominance of official law. The result is that at times pluralism winds up contesting the law. How can this be changed?

We must resist reductionist approaches that focus on one aspect, access for example, rather than on justice itself. The disparities in social power are at the root of injustice. We must look at those causes rather than engage in an obsessive quest for legal solutions.

*“Canadians renew the law by living the law, while justice follows, or rather tries to catch up. There are no easy slogans or quick fixes.”*

Judge Mary Ellen Turpel-Lafond

**Jacques Dufresne**, lecturer, author and founder of *L’Agora*, a journal of ideas and debates, began his presentation with an anecdote. Last summer, his nephew was at a beach in New Hampshire with his wife and their two children. The father and his six-year-old son were



building a sandcastle, when another boy about the same age threatened to destroy it. The father told this lad in no uncertain terms that such an act would have consequences. He nevertheless stomped on the castle. The father then simply held the brat by the wrists, confidently expecting that his parents would soon come forward. Indeed, the boy's mother soon appeared, in a rage. How dare this stranger lay a hand on her son. This was against the law in New Hampshire. The security officer at the beach saw no alternative but to call the police from a nearby town. Following two hours of intense negotiations, the father succeeded in avoiding costly litigation but had to apologise to the child. Is it any wonder that the courts are jammed with cases?

Fortunately, such zeal is less common in Canada, but for how long? Mr. Dufresne observed:

We imitate the spirit of the American laws with such eagerness that we will soon overstep our own model, especially since we subsidize access to justice, or rather to the legal establishment as we know it. By "legal establishment", I mean that authority (yes indeed, I said "that authority") encompassing courts, laws, rules of law and the legal professions.

Access to justice is not the real problem. Just as medicine itself can cause illnesses, the legal system can generate ills. Like alternative medicine, we need alternative justice. Mr. Dufresne provided a diagram of a justice pyramid to suggest an alternative process that treats access to the legal system as a means of last resort (the diagram appears in **Appendix B**). Self-regulation lies at the base, preventive law and alternatives in the middle ground, and the court at the apex. Conciliation, mediation and arbitration should be the preferred means of resolving disputes. Only disputes that cannot be settled by other means and which have an exemplary value would go to court.

Arguing on a philosophical level, Mr. Dufresne suggested that solutions to access to justice issues cannot be found in the type of liberalism derived from thinkers such as Hobbes, Locke or, more recently, Rawls. We must forsake the view that man is a wolf and hark back to the Aristotelian view that man is a social animal, to the "*philia*" that reconciles man and society.

In conclusion, Mr. Dufresne advocated the development of a "softer" justice.

### ***Discussion and Comments***

Following the plenary presentations, each table was asked to discuss what they heard and then to share with all the participants their reactions to the presentations.

The following list summarises comments captured by the note-takers:

- There is a lack of resources to address the underlying causes of criminal and civil justice problems, namely social and economic inequality.
- Resources are a key issue. If we cannot find resources for new and innovative, community-based programs, then access to justice is a hollow practice.

- If we are going to talk about the role of the community in providing access to justice services, then we need to define what we mean by community.
- Recourse to the official legal system should be a secondary response, not a primary one (except for cases involving serious or violent crime).
- The concept of justice means different things to different people. There is a difference between access to the formal justice system and access to social justice. Social justice requires more input and deals with complex social issues. [Criminal] legal justice focuses primarily on sentencing.
- The three speakers gave us the impression that we need a communal or community response to justice issues. However, our society is urban, individualistic and moving away from communal loyalties.
- The justice system is primarily white and middle-class. In theory, the system treats everyone in the same way. However, there is a basic inequity because people are treated differently and have different experiences before they enter the formal justice system.
- The justice system is failing, but it has no solutions. The justice system has become an end in itself; we forget that its purpose is to be a means to an end.
- There has to be some compromise between community justice and “monolithic” or institutionalised justice. Citizen engagement is an important aspect of access to justice. A much broader approach is required to provide adequate access to justice.
- Information technology may help foster better access to justice.
- We must find ways of involving diverse communities. Community models need to be designed; community cohesion is important.
- In the hands of judges, restorative justice can be coercive. This has been the experience with conditional sentencing (e.g. house arrest is the norm, which is inconsistent with restorative justice). There is a risk in taking good ideas and making them bad by incorporating them into the formal system (e.g. what happens if the traditional system “appropriates” sentencing circles with coercive tools?).
- Some participants distrusted government consultation. They suspected that the Symposium was about downloading services to the community. What does shared responsibility mean?

*“Feeding the justice system with endless resources is no longer a solution – access to the justice system is not enough, access to justice is necessary.”*

*A Participant*

*“We need an alternative to the adversarial justice system. As it is, lawyers dominate the system.”*

*A Participant*

There will be many “turf wars” regarding funding for communities, and there will be issues of accountability.

- Education must accompany the emergence of community-based access to justice programs or initiatives. The public must understand that community-based programs do not represent a threat to their personal safety and security.
- There is a need to build a partnership between the government and community, especially between the government and marginalized people or groups.
- Restorative justice programs are not only being implemented on reserves. They are being introduced in urban centres, focussing on local and community problem solving.
- Increased reliance on community-based justice initiatives can be a burden on community groups. There is only so much that any individual or community can accomplish (pilot project burnout).
- How do we lead people away from dependence on the formal justice system toward a more community-based approach?

## WORKSHOPS

Following the opening plenary session participants had the choice of attending one of four workshops concerning key access to justice issues. Each workshop started with a presentation, which was followed by a group discussion. Designated rapporteurs attended each session to record the essence of the discussion and report their findings during the afternoon plenary.

### 1) More or Less? The Economic Perspective

In his presentation, **Stephen T. Easton**, Professor of Economics, Simon Fraser University, suggested that in regard to access to justice, “wants and needs are unbounded.” The question boils down to who will pay how much for what. Inevitably, there will have to be choices:

Consequently, my role as an economist is to suggest that even with new program spending (and especially were Justice to remain within the current envelope), the economic principle of tradeoffs among alternatives should be on the table nonetheless to evaluate the potential candidates for expansion.

“The important question is what constraints are to be put on the process of obtaining enough justice.”

Stephen T. Easton

To illustrate this point, Professor Easton provided a number of interesting facts:

- The number of lawyers in Canada continues to rise. For example, from 1991-1997, the number of lawyers per 100,000 of population rose from 199 to 224.
- There are fewer criminal cases. During the past decade, the actual *number* of *Criminal Code* infractions known to the police had fallen by 15%.
- Although unfortunately recent data do not exist, civil litigation appears to be on the increase. It would be important to know what is actually taking place.

After presenting a table on total spending on different categories of justice services in real 1999 dollars (to adjust for inflation), Professor Easton observed that the movement in total real expenditures in the courts and corrections were relatively gradual while legal aid costs were comparatively variable. These data suggest an important issue:

What kind of budgeting exercise is reasonable in the face of a desired expansion of service? It is easy to spend money. There is no lack of applicants with unmet needs if a government is willing to pay the freight – a look at the history of legal aid proves that. But can services be expanded in a way that is both meaningful to the recipients and to the taxpayer?

It is possible to expand services, but increases in spending should lead to higher benefits or improved results or outcomes:

Regardless of what criteria we choose for expansion, we need to be assured that the benefit from an additional dollar spent on legal aid, for example, should be as beneficial as the additional dollar that could go to the courts, the police or corrections.

One way of measuring this is to characterize service cost. One such characterization was presented in a table showing the cost of justice services per crime known to the police, measured in constant (1999) dollars. It shows that “the costs of justice relative to the number of crimes known to the police have been remarkably stable over the past decade.”

Professor Easton also provided a table concerning the number of offenders in federal and provincial custodial facilities over the past twenty years relative to the number of *Criminal Code* violations. He noted:

These data indicate that there is a stable association between these categories of expenditure and the underlying source of the demand for service that, in this simplified exercise, is taken to be “known *Criminal Code* violations”. The costs and service levels in our justice system are, by and large, stable. There are not great and sudden changes in costs relative to a basic measure of service.

However, if one examines the relationship between crimes and legal aid, there is no such stability. For that reason, it would be very difficult “to rationalize expanding a service that has

been so variable unless it can be shown that a dollar spent on this form of justice yields a better outcome than an additional dollar spent among policing, corrections and the courts.”

Professor Easton concluded with an axiom:

To expand service in any one sector of spending, prove that the present cost per unit of service benefit in that sector is lower than the costs of expanding service in all of the other sectors.

In the case of legal aid, one must be able to demonstrate that “by expanding service you are improving access to justice better than by improving the courts, the police and corrections.”

### ***Discussion***

Part of the discussion centred on whether cost measurement in the area of justice is necessarily limited and whether there is a method for determining fair and effective allocation of resources. Decision-makers want measurable outcomes, but there is deep scepticism whether justice outcomes are truly measurable or whether typical measurements merely serve the interest of policymakers rather than clients. Participants observed that:

- Redistribution of wealth would be a valuable program.
- We need to encourage national principles – there is no reliable expectation as to what to expect from the justice system.
- We must live up to the rhetoric of community capacity building and community involvement in the justice system.
- There is a consistency in funding across all legal services, except for legal aid because it did not have indicators or measures for determining resources.
- We need to consider school programs for young people – youth represent our greatest resource.
- We need research examining whether our current mechanism of incarceration is successful. We need to determine the success rate of the prison system – recidivism, standard of living – and understand if we have made improvements.

*“There is a lack of systematic thinking about what a successful outcome is.”*

A Participant

### **2) New Partnerships and New Delivery Mechanisms**

**Lois Gander**, Professor of Legal Studies Program, Faculty of Extension, University of Alberta, began her presentation by reminding participants that many citizens consider the current legal system to be deeply flawed. It was important therefore to think

*“We find ourselves asking **what** access to **whose** justice?”*

Lois Gander

outside the box.

*What has Propelled the need to Re-think Access to Justice?*

The challenges facing Canada's legal system have been provoked by a variety of factors:

- The public is increasingly dissatisfied with the law and the form of procedural justice it promises. Our system promises us our “day in court” – our chance to present our case to an objective judge in accordance with established procedural safeguards. But our system doesn't actually help most people get to court on most of their claims.
- The equality provisions of the *Charter* have created the expectation that the law can deliver not just procedural justice but substantive justice, raising the legal stakes considerably.
- The law seems to offer us too little protection against the lawless.
- The multicultural makeup of Canada means we have widely divergent experiences with fundamentally different legal systems leaving us with no public consensus on the meaning of justice.
- Canada has become a ‘rights based’ and litigious society.
- Maintaining a legal system with these demands on it requires an increasingly complex and expensive administration for which the public is less and less willing to pay. As the public sees it, they are being asked to pay more and more for a system that is increasingly dysfunctional.
- The cost of legal services bears no relationship to the benefits delivered.
- We have become consumers of services, even government services like our courts, without taking any responsibility.
- Globalisation and post-modernism have presented new challenges to the efficacy of the law and doubts about its ability to deliver a satisfactory form of justice.

*Whose justice?*

We must give citizens the responsibility for determining what kind of justice they will have:

[...]we need forms of public engagement that promote conscientious participation in, informed discussion about, and enlightened reflection on the meaning of justice as it is played out in real life situations. We must strive for an inclusive notion of justice, one that draws from the richness of the diversity of Canadians' experiences. Moving forward on

this means finding ways of engaging everyone in meaningful contemplation of the most fundamental issue we confront as a civilisation.

To a certain extent, this is already taking place in some of Canada's most troubled communities where restorative justice programs have been initiated:

Restorative justice is not the only vehicle we have for re-imagining justice but it is a handy one since police forces are implementing this approach to fighting crime in communities all across the country. Properly run, restorative justice programs provide us not just with new forums for dispensing more satisfying justice but with new sites for advancing our understanding of justice itself. Restorative justice programs empower individuals to exercise the duties and to experience the rewards of acting as citizens in a democratic society.

*What access?*

In rethinking justice, we must also be open to "other ways of conceiving the sources of justice." Justice is not something to be delegated to institutions but lived in our daily lives as members of communities that recover their ability to manage their conflicts:

New visions of justice are only possible if we are prepared to abandon the familiar for a moment and entertain alternatives, no matter how unrealistic they may seem at first. Within them may lie the germ of an idea worth maturing. In the last few decades we've experimented with a variety of alternatives to our mainstream legal system in the forms of alternative dispute resolution, voluntary compliance, diversion from the criminal justice system or creative processes for sentencing offenders. We have had much success with these efforts. They embolden us to move even further away from the centrifugal force of the legal system.

However, governments cannot simply download and outsource justice to communities without providing resources in a variety of forms. This may also mean shifting resources "away from conventional legal systems and services." Our ability to make these difficult choices will be the test of our commitment to justice.

### ***Discussion***

Professor Gander posed the following questions after her presentation: How do we renew the law to accommodate new ideas of justice and what do we want from the justice system?

Participants expressed a variety of views:

- What is the role of the *Charter* in providing access to justice? In many ways the *Charter* has only provided some people in society with access to the justice system.

- The victim has been alienated from the criminal justice system process.
- If we cannot get everyone to agree on justice issues, then it is the role of the government to set standards (we must draw a line between criminal and social justice). In this respect, we cannot forget about the role of the traditional justice system. We must be modest about using alternatives and recognise that there are limits to what the justice system can achieve.
- Before thinking about a new system, we need to consider whether the old system can be made more accessible.
- Participatory justice does not necessarily mean participation in decision-making. Those in the decision-making process must understand that there is more to justice than their elite world. They have to espouse as a goal of justice and equality, good and just doctrine.
- We must recognise the growing gap between the “haves” and the “have-nots”, otherwise we will not be able to understand the essence of the controversies.
- Youth are the most valuable resource in helping define an alternative or a new justice. Youth are undervalued as a resource and they it should be empowered.
- Empirical work suggests the worst off in society identify police as the source of injustice, while the best off believe the state is the main source of injustice.
- Public legal education tells us that the public is not satisfied with the way that we enact laws and provide justice.
- Technology will change things and we need to reserve public space for this phenomenon.
- Restorative justice was described as an alternative to the formal justice system. One participant suggested that we must look outside the formal justice system in a meaningful way, and that restorative justice cannot be treated as a diversion program. Aboriginal people have had a system imposed on them that they have never recovered from. Restorative justice involves healing and restoration in a way that is different from traditional systems.
- The concept of citizenship and citizen involvement in the justice system must be redefined.

*“The justice system is not either/or; it’s not one-size-fits-all.”*

A Participant

### 3) Diversity and Access to Justice

Professor Brian Etherington, Faculty of Law, University of Windsor, led this workshop. Professor Etherington provided his views on how well the access to justice needs of diversity groups were being met in Canadian society. He noted:



We have witnessed significant advances on the substantive side of the ledger, both in the recognition of diversity interests and the meaning of justice and equality for members of diversity groups. However, those advances on the substantive side have not been met with corresponding advances in terms of delivery mechanisms and procedures necessary to achieve access to justice.

He went on to illustrate how our justice system over the past twenty years has significantly improved recognition of diversity interests deserving of protection. The early to mid-1980's were a particularly important period in this regard:

The traditional meaning of equality as purely formal equality in the sense of identical treatment for all regardless of their personal attributes was rejected in favour of a new conception of substantive equality of opportunity to demonstrate one's potential without being impeded by barriers which are based on irrelevant diversity attributes or which have an unnecessary adverse impact on members of groups identified by a prohibited ground of discrimination.

However, in spite of this progress, there has been little success "in developing delivery mechanisms to meet the promise of substantive growth in the right to equality." The reasons for this failure are many: they include flawed implementation and evaluation measures and reporting mechanisms and the lack of adequate resources. Finally, there is a trend developing which consists in "transferring jurisdiction over statutory individual rights claims from public officials and tribunals to private organisations and procedures - unions and grievance arbitration." There is a danger in this:

The concern raised by the twin spectres of privatisation and collectivisation of processes for the enforcement of *Charter* and human rights is that the tenuous balance between the values of access to justice and substantive equality and the values of efficiency and the market that is inherent in any regime for the protection of human rights will gradually be skewed in favour of the values of the market.

Mr. Etherington drew the following conclusion:

The promise of equality and protection for diversity interests offered by recent legislative and judicial developments concerning the substance of our *Charter* and human rights law has never been greater. But the realisation of that promise for many members of diversity groups is threatened by our failure on several fronts in recent years to develop appropriate delivery mechanisms for access to justice. These shortcomings include: a failure to find acceptable and effective mechanisms for the imposition of employment equity measures on a system-wide basis for most Canadians; a failure to provide adequate resources for effective mechanisms to handle individual discrimination complaints under traditional human rights regimes; and a trend towards the privatisation and collectivisation of processes for resolving individual *Charter* and human rights complaints.

It will prove very difficult to overcome these shortcomings and refocus on access to justice for the protection of diversity interests in the current economic climate:

What is required is nothing less than a recommitment to the values of access to justice for the protection of diversity interests and a search for new resources and public mechanisms for delivery that will allow us to close the gap between promise and experience. But we must be careful in considering alternative delivery mechanisms to focus more on their effectiveness in protecting diversity interests than their efficiency in clearing caseloads.

### ***Discussion***

The presenter asked participants to consider what could be done to establish a mechanism to deliver on promises of recognition, of equality rights and of diversity. Here are some of their comments:

- If the trend toward privatisation continues, there will be a need for different types of mediation to protect rights. People in many situations have no legal power (i.e. human rights issues, employment standards, the Immigrant and Refugee Board mediation process).
- The current legal discourse does not capture the intersecting grounds of discrimination (e.g. being Aboriginal and a woman). Although they pose their own challenges, alternatives like mediation can do a better job of dealing with these intersecting grounds (race, class and gender) than the mainstream.
- If a power imbalance exists, we must address more than the mechanisms in place to deal with access to justice. We must look beyond the symptoms to the systemic social problems.
- There must be a firm commitment to ensure diversity and access to justice. Institutions that provide access to justice are not committed.
- With respect to access to justice, the good news is that the problems and challenges are recognised. The bad news is that we are not sure about the solutions to deal with difficult issues.
- We have to break down the rigid categories of access to justice and get away from a narrow litigation process to address real issues (e.g. residential school proceedings must deal with issues of sexual, physical and emotional abuse).
- Before we consider the mechanisms to deliver “our promises,” we must look at what these promises are and who we are as a society.

*“There is an overwhelming lack of willingness in the courts to discuss racism.”*

A Participant

- We cannot abandon the mainstream system while we are searching for alternatives. What do we know about strategies developed in recent years to open up the mainstream system – strategies for opening up the bench and law schools, and strategies for policing, sensitivity training, and their associated impact?
- It is always the people in positions of power who talk about “partnerships”, not the people in the community. We need to redefine the relationship between power and communities.
- There is support for equality and diversity by those in power only because it is the politically correct thing to do. It is important to have a stronger political lobby. We also must develop a set of expected outcomes and monitor progress.
- You cannot promote better access to justice without resources and better accountability. People in power are willing to change, but there are no resources.

*“We have a tradition of celebrating the law and avoiding the issue of race; the system deals with race by avoiding it. We obfuscate the issue with terms like “diversity” but what does that mean? Racial prejudice plus institutional power equals racism”*

A Participant

#### 4) The Role of Citizens and Communities

**Carol McEown** of the British Columbia Legal Services Society (Vancouver) was the workshop leader. To help frame the discussion, she recounted three stories describing community efforts to use or deal with the legal system.

The first story was about the work of the Upper Skeena Counselling and Legal Assistance Society which, soon after its establishment, found itself dealing with Aboriginal rights issues. One case involved fishing rights. Charges were laid against 17 people and family nets were seized:

The charges were bandied about in the courts for over a year until our chiefs decided to take the system on. The nets illegally seized by the Fisheries officers were retrieved when our chiefs marched into their office, into the holding rooms and took back their nets! A judge who was instrumental in keeping the cases afloat in the court was gotten rid of when we challenged his racist comments and finally, the Supreme Court of BC assigned a judge who heard all charges in one day. The cases were thrown out of court! What a memorable victory!

This story illustrates how, by asserting its rights, a community learned to “use the law to promote [its] interests”. The community later successfully negotiated the creation of child welfare committees and new protocols to protect aboriginal children.

The second story was about the efforts of community groups to help people appearing without representation in family courts. A program was developed and funded to provide family court advocacy training so that people could help applicants and respondents fill out family court forms and prepare their cases.

The program initially was very successful, but an evaluation conducted two years later revealed that “half of the advocacy projects had moved away from helping clients to represent themselves to providing information, referral and ‘emotional support’.” Ms McEown explained:

Two critical elements were needed to make the project work. The community group sponsoring the program had to have stable funding, sufficient resources to manage the program and credibility in the community. As well, it needed one person in the family justice system as a partner. Without staff and community credibility, it could not maintain the services. Without the support of someone in the system, it was too hard to continue to provide the service. Clients weren’t referred, their work was challenged, and backup wasn’t available.

Part of the problem is also that procedures have become much more complex. What seems to be missing is any kind of co-operative effort to recognize and respect the challenges faced by an individual seeking to resolve a problem that has a legal solution.

The third story concerned restorative justice programs for youth. Such programs were community-based and solution-oriented with the purpose of keeping youth out of the court system. Ms. McEown observed:

*“The rules are much more complex forcing people through many doors and forums before they can ask a judge to make a decision in their matter.”*

Carol McEown

All the community needed to do was convince corrections and the provincial government to use less money for lock ups and put it into alternative programs. When I spoke to the province, the response was that if the programs were funded, they would no longer be true community initiatives.

Meanwhile, she would hear stories about kids who normally would never have been charged agreeing to punitive sentences because they did not know they had a choice.

These stories suggested three issues that need to be addressed:

1. There are many communities. Where is the venue to discuss the different views of justice and to learn about other ways to provide justice?
2. Programs developed by one community may not be appropriate for another. Alternative dispute resolution models or restorative justice are seen as the new saviours of the justice system.

### 3. How do we get the justice system to share its power and its resources?

#### **Discussion**

The discussion quickly focussed on how to define communities and how to involve them in the access to justice process. Participants made the following observations:

- It is very difficult to keep the community involved. It takes time, care and dialogue to identify your community on the ground (to build bridges). You must be flexible and accommodate diversity. Moreover, some communities are not interested in delivering services.
- We talk of organizing communities to interface with the formal justice system, but how is this done? How do we integrate and how do we ensure that someone with authority is in the community?
- Some participants were concerned with the downloading of services and responsibility to the community. The community needs adequate resources so that the community is not simply a “cover” for off-loading.
- Law is not the best resource when there is a breakdown in the community. There is a need to support social systems so that the law is the last resort. Under the current system the law deals too often with social problems.
- Justice should be an informal process. Communities are partly destroyed by the rule of law, so perhaps we should avoid this approach.

*“Public education is an important part of community development.”*

A Participant

#### **AFTERNOON PLENARY**

During the afternoon plenary the rapporteurs summarised what they heard during each of the four workshops. This in turn led to further discussion.

##### **1) More or Less? The Economic Perspective**

**Owen Lippert**, The Fraser Institute, was the rapporteur for this workshop. In addition to providing a summary of the workshop presentation and discussion, Mr. Lippert challenged participants to consider the “why” question when deciding if “other or alternative” access to justice programs should receive funding.

He also encouraged attempts to address the root causes of access to

*“Access to justice is no longer about absolute need, but a relative one, when it comes to scarce public funding.”*

Owen Lippert

justice-related problems, “within the competency of justice providers,” and remarked that decisions concerning funding of access to justice programs should depend on research, “not political whims.”

### *Discussion*

- We need to encourage the development of national principles – there is no reliable expectation as to what to expect from the justice system.
- We must start practising what we preach in relation to community capacity building and community involvement in the justice system.
- Legal aid does not have indicators or measures for determining the resources needed.
- We need to consider school programs for young people – youth represent our greatest resource.
- We need research on whether our current mechanism of incarceration is successful. We need to determine the success rate of the prison system – recidivism, standard of living – and understand if we have made improvements.

## **2) New Partnerships and New Delivery Mechanisms Workshop**

**Maureen Maloney**, Co-director, Institute for Dispute Resolution, University of Victoria, British Columbia, noted that, among other issues, participants in this workshop discussed the challenge of promoting participatory justice and the need for recognising the difference between criminal justice and social justice. Solutions discussed included enunciating the basic principles of the justice system (e.g. respect, fairness, accountability and tolerance) and encouraging changes in the culture of justice (e.g. building partnerships and stop thinking that justice officials are the authority with all the answers).

Ms. Maloney then asked participants to consider how globalisation will affect our conceptualisation of justice and what the system of justice will look like in the in the next ten years given the new information age.

*“Our society is so diverse, so the answers to justice-related issues will be diverse. We may need a philosophical shift from a neo-liberal based system to one grounded in the community and aware of cultural issues.”*

**Maureen Maloney**

### *Discussion*

- Globalisation has meant that we have less ability to make our own decisions (decreased sovereignty). Many justice issues, to a certain extent, are no longer a sovereign issue (e.g. people suing companies in other countries). It is hard to answer the globalization question because it includes so many facets.

- Globalisation is creating disparities in developing countries, restricting the mobilisation of people. For instance, some multi-national companies keep people in developing countries in low-wage positions. We criminalize those who use illegal means to enter Canada while corporations benefit from the law. The mobility of people is restricted in favour of the mobility of capital.
- Although people see globalization and the information age in a negative light, there are some benefits also. For example, the information age has allowed some Aboriginal communities to communicate with groups in other countries. This has given them a stronger voice.
- Justice is the downstream recipient of social problems whose origins are outside the justice system. There is an assumption that the justice system contains the best solutions, but sometimes it has the worst solutions. We need to access solutions instead of accessing justice.
- There is a risk involved with emphasizing information technology as a means of reaching out to non-traditional communities. However, information technology is important and the Department of Justice should take it seriously.
- Another concern with information technology is the growing commercialisation of the Internet. We must ensure there is necessary public space (danger of corporate sponsorship) for discussing justice issues.
- Technology has a way of minimising the public space. People will just stay at home and not have public discussions. We need to find a way for people to still meet face-to-face.

*“Justice needs to be tailored to local solutions because of growing cultural diversity.”*

A Participant

### 3) Diversity and Access to Justice

**Maggie Hodgson**, from the Assembly of First Nations, was the rapporteur for this workshop. Ms. Hodgson started with a prophecy that the year 2000 will be a year for healers and reconciliation. It will be a spiritual as well as a legal process focused on building relationships and convincing people to treat each other with respect. Diversity and justice is not just a legal process, it is a spiritual process.

*“Money does not fix pain, nor does it lead to justice.”*

Maggie Hodgson

Ms. Hodgson also noted that the mainstream system of justice assumes that once a decision is reached that the problem is gone and that justice has been reached. Do we really want this complaint driven style of justice? Where is the willingness to change institutional powers?

## Discussion

- How do we articulate the process of empowerment? How do we measure progress and change? Where there is an increase in equality and justice, does this provide us with outcomes?
- Different communities have different needs (e.g. Afro-Canadian and Aboriginal communities have different needs).
- There needs to be an increase in the visibility of diverse groups working in the justice system.
- When a community is empowered, what is actually happening? Who is being empowered and where is the accountability?
- The ultimate measure of justice is reconciliation and acknowledgement of wrongdoing, but we typically deal with conflict through restitution measures such as financial compensation. It is critical that the community helps define the resolution to a complex problem (e.g. residential schools).
- The evaluation process is largely political. Government usually just wants the evaluation completed so that it can say the program has been evaluated.
- Prevention and its merits often are not mentioned in studying objectives – prevention should be measured.

*“We need to stop relying on prison as a response to crime (e.g. over-representation of Aboriginal youth).”*

A Participant

## 4) The Role of Citizens and Communities

**Penelope Rowe**, Community and Social Services Council, Newfoundland and Labrador, provided the final workshop summary. Ms. Rowe noted how society is becoming more polarised (between the rich and poor, educated and uneducated, rural and urban regions, those with access to influence and those without) with a greater threat to the breakdown of social cohesion. Government public policies are sometimes mixed, and often in direct conflict. Interestingly, the matter of “access to justice” is not really a public concern. It is not addressed within the broad public context.

*“The overriding challenge is making it all come together: building bridges, having a network of trusted and skilled interlocutors and more effective partnerships, finding better ways to integrate what we know and sharing knowledge and best practices”*

Penelope Rowe

Ms. Rowe suggested that we must understand justice in all its dimensions, as a concept that is broad and all encompassing. It must include dealing with broad societal – social justice – issues such as health, insecurity, education, and poverty (e.g. the “determinants of health model”). We understand and often voice these ideas, but the policy, programs and resources are not in tandem. We need more horizontal dialogue, and planning and



policy design that will help achieve greater policy and program coherence. Ms. Rowe then asked participants to consider how we should accommodate and manage change, what the next steps are for advancing the “access to justice” debate, and how we overcome barriers between all levels of government and diverse populations.

### *Discussion*

- The discussion of community involvement is unfolding during a period when government is cutting social programs and abandoning national standards.
- How do we overcome the conflict caused by the jurisdictional confines? How do we reconstruct our current framework to integrate communities?
- The current legal and justice system is a conflict based construct – based on the precept of “winners and losers” and by its very nature tends to break rather than repair relationships.
- Discussions about community involvement are euphemisms for government downloading and resource reduction.
- It is not a one-size-fits-all scenario. We need to rebuild bridges between jurisdictional responsibilities and we need to mobilize communities and sustain community-based projects.
- There is a “ton” of good “pilot programs” that need to be researched and understood.
- Some participants believed that community participation was positive in that all levels of government could fund these programs. However, others cautioned that governments often bring their jurisdictional issues to the community level, thereby diminishing community capacity to deal with justice-related issues.

*“There needs to be a commitment to power share and to the concept of inclusion.”*

A participant

### **SYNTHESIS - THE KEY CHALLENGES**

The difficult task of pulling together the various ideas and comments formulated during the day fell to **Gilles Paquet**.

He observed that the message that emerged from the first session of the Symposium was that the record of Canada in respect of access to justice might not be as enviable as is usually believed. In short, “the ‘fortress’ of the formal justice establishment as defined by the traditional courts is not impregnable, [...] there even is ‘péril en la demeure’ when one examines carefully the ‘house of justice’ in Canada.” The three panel members provided different perspectives

*“If you only have a hammer, everything looks like a nail.”*  
Anon.

Quoted by Gilles Paquet.

on the ways to improve access to justice through better prevention, closer connection with communities and more restorative justice.

Mr. Paquet noted that, in a sense, the workshops opposed the “Barbarians” to the “Insiders”, that is, the outsiders to the insiders:

The first three workshops were constructed around the concerns of groups outside the fortress of the formal justice system: (1) the citizenry and communities, (2) the diversity of groups making up the Canadian social fabric and those concerned with their welfare, and (3) the economists who have a perspective on the justice system quite different from the lawyers. The fourth workshop was focussed on the examination of alternative instruments and partnerships that might be used to improve access to justice.

What was clear was that the outsiders wanted in. There was a strong feeling that “the lay community and the citizenry in general should participate not only in the process of lawmaking, but in the process of production of justice.”

Mr. Paquet encapsulated some of the messages he drew from each workshop as follows:

#### *Citizens and communities*

The debate centred on the difficulty in defining community, in operationalizing the roles of citizens and communities, and in ensuring that the requisite infrastructure needed for the citizens and communities to operate effectively in a world (1) where the courts are not the only forums the citizens need to access and (2) where circumstances are such that a “one-size-fits-all” strategy is not useable, would be put in place.

#### *Diversity*

The formal system has given recognition with particular force to the argument of access to justice through equal treatment. There has been some “judicial progress” on this front. But it was found that the formal system has not been very successful in developing delivery mechanisms to meet the promise of substantive growth in the “right to equality”.

#### *Economics*

The case for the importance of research and measurement in determining resource allocation within the justice system is obviously strong. Moreover, the suggestion that outcome measurements may serve as surrogate numbers for what the price mechanism reveals in the private sector is reasonable. However, the temptation to ascribe too much potency to the rational model or to lionize quantophrenic exercises was not always altogether avoided in the debates.

### *New mechanisms and partners*

It was recognized from the very beginning that the diversity of the Canadian population, and the unequal distribution of income and wealth but also of access to power, made it impossible to accept that a one-size-fits-all system would work.

A common theme to the workshops was the need for more or different resources, particularly for restorative justice. Participants also drew attention to the basic inertia of the formal justice system. A significant aspect of this system is the nature of its financial infrastructure, that is the manner in which lawyers and other workers in the system are remunerated and the relative efficiency and effectiveness of the current apportionment of resources. Finally, the current system has tended to focus on rights while not paying sufficient attention to a needs-based approach that might help solve problems up-stream.

The many pressures on the justice system have led to paradoxical situations. For example:

It is difficult to see how this call for substantive equality and sameness can be reconciled with local justice or different standards being applied according to circumstances. This paradox strikes at the heart of the formal justice system and challenges its present incapacity to provide the requisite amount of casuistry.

Moreover, calls for inclusion and participation may challenge some of the fundamental features of our democracy in that they “are often seen as short-circuiting due process”.

Mr. Paquet concluded with a few suggestions about what might be done to improve access to justice in the short run. The first is to define, at least in terms of values, what sort of justice we want.

Second, it was also clear that one cannot explore the different possible alternative mechanisms or alliances with other groups in defining an improved system of access to justice without a better knowledge of what experiments have been conducted, and with what degree of success, in Canada or elsewhere. Such a catalogue does not exist. It would appear crucial to ensure that it is prepared forthwith.

Third, serious efforts must be made to encourage “the maximum amount of experimentation and innovation in the development of better access to justice.”

These shortcuts could prepare the way for more fundamental changes in the long run.

**Janice Charette**, Senior Assistant Deputy Minister, Policy Sector, Department of Justice Canada, delivered the closing address. Ms. Charette noted that, throughout the day, Symposium participants identified the need for expanding the concept of access to justice to include new and innovative community-based approaches (e.g. access to justice as part of a holistic system that includes health and social policy). She also evinced that many participants encouraged more research and knowledge sharing, and that new access to justice initiatives must be sustainable

and respectful of the fact that one size does not fit all. Ms. Charette concluded by thanking the participants for making the Symposium a success.

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## CONCLUSION

In overall terms this one-day of extra-ordinary conversation revealed that, perhaps more than ever, people from both inside the justice system and other areas of human endeavour are very disenchanted with the mainstream justice system. Amongst this eclectic group of leading thinkers there was a tremendous appetite for change, remarkable support for re-imagining the traditional justice system, and a general eagerness for experimenting with new and innovative ways for assuring all Canadians have access to justice. However, much work remains. The Symposium only represents the beginning of an important process of re-examining the substance of access to justice and the means to achieve it.

Despite the fact that the Symposium did not provide a recipe for change, it did reveal a set of themes that can act as guideposts toward a better and more accessible justice system. The following list provides a glimpse of these guideposts:

1. **Restorative justice** was frequently discussed throughout the Symposium. In general terms restorative justice is an attempt to restore the relational dimensions of the justice process by recognising the role of the community and the importance of human interaction. It represents a process of healing and spirituality, not simple diversion. Many participants pondered what the non-Aboriginal community could learn from restorative justice approaches.
2. From the outset participants maintained that **access to the justice system is not access to justice**. As Roderick Macdonald argued in his opening plenary presentation that “we come to focus on ‘access’ to justice rather than justice itself; and while we proclaim ‘access to justice’ as a goal, what we really mean is ‘access to law’”. The most significant concerns about justice faced by Canadians have little to do with narrowly cast legal rights; they have to do, rather with the recognition of respect.”

Many participants argued for a conceptual shift in the culture of justice to facilitate a better understanding of the difference between access to the justice system and access to justice. However, Lois Gander from the University of Calgary argued that “new visions of justice are only possible if we are prepared to abandon the familiar for a moment and entertain alternatives, no matter how unrealistic they may seem at first. Within them may lie the germ of an idea worth maturing.”

3. An implicit tone to many discussions was that **justice is achieved when a solution satisfies all parties involved in the dispute**, a decidedly non-adversarial approach. Many participants articulated that justice is an inherently social and solution-oriented endeavour that does not easily fit into narrowly defined legal regulations.

4. Many participants firmly believed that providing access to justice is contingent upon recognising the diverse needs of Canadians – **one size does not fit all**. Indeed, issues of gender, race and class underpinned the various discussions, and, in the process, emphasised the challenge of assuring access to justice for diverse, marginalised, and disadvantaged groups.
5. Many participants described the traditional justice system as being ill equipped to meet the needs of the community, and that the capacity to solve problems actually rests within **community-based justice programs and initiatives**. Despite this recognition, many participants expressed concern about the logistics of realising this process. How to encourage localised notions of justice, and how to reconcile it with calls for “substantive equality and sameness” remains an unanswered conundrum.

A corollary to discussions concerning the role of the community was some debate about partnerships between communities and various levels of government. To what extent should the government become involved in community-based justice initiatives? Is “community-based” justice a euphemism for government downloading of services and responsibilities?

Moreover, many participants cautioned against overlooking the role of the traditional justice system. “Don’t throw out the traditional civil justice system”, argued Carol McEwon, noting that many community groups are just now beginning to learn how to use the system to their advantage. To them, the law is a powerful tool for protecting rights and promoting change.

6. A common message conveyed throughout the Symposium was that **meeting needs is equally important as protecting rights**. Our current system of justice is based on a protection of rights framework. The thinking at the Symposium emphasised, in addition to protecting rights, the importance of meeting the needs of individuals attempting to access justice. Many participants argued that understanding diverse needs could only be achieved through community consultation and extensive research.
7. The issue of **sharing power and resources to achieve access to justice** surfaced at several junctures of the Symposium. Total justice system spending exceeds \$9 billion each year. Members of disadvantaged groups must be given a meaningful role in designing justice system change, and the existing resources must be shared in order to allow experimentation with new ways of providing access to justice.

These guideposts only briefly touch on the key Symposium themes and their implications for justice policy. The Research and Statistics Division at the Department of Justice Canada will continue to examine the wealth of information that came out of the Symposium in a series of more analytical reports. However, much work remains. The Symposium provided a rich body of information and perspective from leading Canadian thinkers about providing access to justice for Canadians. This represents an abundant source of ideas for policy research and development in this key area.

## APPENDIX A

### Expanding Horizons: Rethinking Access to Justice In Canada

**Delta Hotel, Ottawa**  
**March 31, 2000**

#### AGENDA

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- 8: 00 a.m. Continental Breakfast
- 8:30 a.m. Welcome by Mr. Morris Rosenberg, Deputy Minister of Justice and Attorney General of Canada.
- 9:15 a.m. **Panel:** Three perspectives on Access to Justice (Mr. Jacques Dufrèsne, Mr. Roderick Macdonald, Judge Mary Ellen Turpel-Lafond), followed by group discussions.
- 11:00 a.m. **Workshops.** Participants will attend one of four workshops on the following topics.
- 1) More or Less? The Economic Perspective (Presentation by Mr. Stephen Easton)
  - 2) New Partnerships and New Delivery Mechanisms (Presentation by Ms. Lois Gander)
  - 3) Diversity and Access to Justice (Presentation by Mr. Brian Etherington)
  - 4) The Role of Citizens and Communities (Presentation by Ms. Carol McEown)
- 12:30 p.m. Lunch
- 2:00 p.m. **Plenary report** on workshops and discussion of key challenges for the future.
- 3:45 p.m. **Summary of key challenges** for the future (Mr. Gilles Paquet).
- 4:15 p.m. **Concluding remarks** from Mr. Morris Rosenberg, Deputy Minister of Justice and Attorney General of Canada.
- 4:30 p.m. Closure

## APPENDIX B

### **Citizen Access to Justice:** Issues and Trends for 2000 and After

Mark Kingwell, University of Toronto

(Prepared for the Symposium: **Expanding Horizons: Rethinking Access to Justice.**  
Hosted by the Deputy Minister of Justice and Deputy Attorney General of Canada.  
March 31, 2000, Ottawa, Ontario)

### **Introduction**

In this short paper I am going to identify some key issues and trends for access to justice as Canadians enter the twenty-first century. This is not an exercise in prognostication or futurism, but instead an attempt to characterize matters that already concern us, and will likely continue to do so in the years to come, as we struggle to make Canada a more just nation.

I write from a particular perspective, that of the political philosopher and social critic. I will not assess here the current state of federal policy, or summarize the recent access-to-justice literature, tasks for which I am not competent in any case. Nor will I mainly focus on the specific issue of access to the justice system. My intention is, instead, to offer a survey of some larger-scale ideas that might help us think more productively about access to justice, beginning with some deeper reflections on what justice itself is, and why we, as citizens, need to feel that channels of accountability and influence are open to us in pursuit of a just society.

It is important to state immediately, as a baseline assumption, that access to the justice system must be part of any just society; and that, moreover, Canada's record in this regard is not as enviable as some complacent politicians would have us believe. Despite the worthy efforts of legal aid programs and other measures aimed at more general distribution of this key social good, it is still the case in this country that those with greater financial means consistently enjoy greater access to, and wield more influence within, the machinery of law and the courts. Not every part of justice is about going to law, as I will argue below; but if many of us still cannot afford to fight a legal battle, or defend ourselves formally, when that is the appropriate course of action, then we cannot rest content about the larger questions of justice. As always, the courts are a limit-case of whether a given citizen is being served by the social system to which he or she belongs.

In the remainder of this paper I will focus on the following five main trends and issues. (1) The still-growing diversity of Canada as a nation, and the changing face of the global population of which it is a part. (2) The growing globalization of political experience, consequent upon the globalization of economic and cultural life, and a resulting decline of faith in national sovereignty. (3) The complex isomorphic relationship between cultural and political experience – a relationship swiftly changing, now up to the global level. (4) The role of technology, and access to technology, in political life. And (5) The possibility of new forms of citizen action, and access to justice, in our speedy times.

In the space available I will only be able to sketch the issues in outline, but I hope these

sketches, necessarily so brief in this form, will lead to further discussion.

## 1. Diversity

Canada has an enviable record in accommodating cultural and ethnic diversity within its evolving form of federalism. In this sense, it is a success story in the contemporary problem of making liberal states responsive to the challenges of a changing citizen base. But Canada still falls short of true accommodation of difference, especially in crucial justice-based areas such as the legal profession and the court system. (Also the universities, government more generally, and many professions.)

The basic insight of liberalism, the dominant form of modern political theory, is that states are legitimate if and only if they provide room for differences of opinion with respect to how one may live. At the inception of the European modern era, this principled tolerance was directed mainly, if not exclusively, towards the issue of religious diversity, and was in large measure a pragmatic solution to the problem of bloody wars based on sometimes arcane theological disagreements. (That a disagreement is arcane is not, as history shows, any reason for the resulting conflict to be any less serious, or less violent.) Early liberal theorists such as Locke and Spinoza argued that a society might tolerate different routes to salvation, as a matter of personal interest, so long as basic structural matters such as property and contract were secured centrally. Gradually, the idea that any state should have a single, comprehensive theological or philosophical basis – a "perfectionist" view of its citizens – was replaced by the idea of the state as a guarantor and guardian of basic rights, with personal matters left to private reflection.

This is crude summary. In practice, many old ethical and religious conflicts continued and many new ones entered. The liberal solution to diversity has never been perfect, and has lately been challenged by particularistic claims made on behalf of groups who feel marginalized by the central tenets of the liberal orthodoxy: women, gays, people of colour, First Nations. By the same token, religious differences have lately been supplemented by differences in culture, race, gender, and sexuality as issues in political accommodation. This has forced liberal states to be flexible and open-ended, and to find new forms of compromise among citizens who may share only very little in the way of basic ethical commitments.

It thus begins to make sense to speak of "liberaloid" rather than liberal states: ones that manage to combine quite substantive central documents such as the Canadian Charter of Rights and Freedoms (which goes beyond the minimalism of classical liberalism) with looser forms of citizen identity that demand little in terms of agreement or central identity. Given the growing diversity of our population, and the changing face of the global population, where those of European descent are in a shrinking minority, this open-endedness is appropriate and necessary.

There is, however, a lag in responsiveness to this diversity within institutions, in particular institutions that are designed to be preservative. For present purposes, the Canadian court system is a good example. While there have been substantial gains made in recent years by women, people of colour and Native Canadians, they are still dramatically underrepresented on the country's benches. In ways sometimes too subtle to measure, this affects the quality of justice available to many citizens of this country.

It also, more deeply, opens up the question of whether Canada as a society is being sufficiently responsive to the growing range of cultural and ethnic differences that mark the



Canadian population. Canada has proved itself comparatively welcoming to people from elsewhere in the world who want a better life. A persistent challenge as we move into this new period of our history will be to follow through on that welcome, to make the social and political infrastructure of the country a reflection of the many kinds of people who choose to call themselves Canadian.

## **2. Globalization and Citizenship**

The other side of our relatively open immigration policy, the side facing outward rather than inward, poses a different kind of challenge. It means that we must now reconceive our justice commitments externally as well as internally. Such rethinking is likely to alter our sense of what it means to be a citizen of Canada -- or of any other currently existing country.

It is a commonplace today to note that old ideas of civic belonging no longer compel our attention or answer our needs. Nevertheless, it is a commonplace worth repeating, and one that has special resonance for the question of access to justice. The political structures to which the old ideas of civic belonging are wedded, including national governments and their routine exchanges of services in return for tax loyalty, are not yet dead. But they are suffering -- and they are often as nothing compared to the real powers of our world, the real centres of loyalty and identity for most people: corporations. (That loyalty is, to be sure, quite often misplaced or undeserved.)

Corporations and firms have not simply taken over the structures of production and consumption. They have also, in extreme cases, usurped our private selves and our public spaces. They have, furthermore, created bonds of belonging far stronger than any fractured, tentative nation could now hope to offer. They provide structures of identity and loyalty, ways of making sense of one's place in a complex world. They are also far more powerful, and richer, than many nations: the annual budget of France was only three-quarters of the combined value of America OnLine and Time Warner when those two media giants merged in January 2000, and Kmart's 1998 U. S. sales were equal the estimated budget of the entire Russian military.

But corporations are not democratic, and they do not possess the political legitimacy that is necessary to justify that kind of power. We have global markets, however unjust and skewed; and we have a global culture, however banal and enervating. What we don't have, but desperately need, is a global politics to balance and give point to these de facto universal facts.

These issues are relevant to access to justice because the abrupt restructuring of power vectors around the world has meant, in many cases, a drastic diminution of national sovereignty and, hence, a reduction in the ability of national governments to meet the needs of their own citizens. Countries that were formed in the eighteenth- and nineteenth-century rounds of unification, or emerged in strength after the upheavals of world war in this century, no longer appear viable. In many cases, including Canada, the nation of yesterday is increasingly reduced to the economic colony of today, beholden to markets that have no respect for sovereignty. A member of the G7 (G8 if that other crumbling nation-state, Russia, is invited; or even G20 in a later formulation), Canada nevertheless lacks power in arranging its own affairs.

What this means for citizens is not yet obvious. Should they seek accountability, and hence justice, at other levels of governance, as when protesters organized against the World Trade Organization meetings in Seattle in 1999 (the first significant acts of post-national

citizenship)? Or should they continue to seek access to the resources actually commanded by their national government, even as those resources become more attenuated and unreliable? Undoubtedly the immediate future holds the challenge of finding complex, multi-tasking forms of citizen action in the service of justice: we will have to tailor demands for accountability and just distribution of social goods at the appropriate level, the level where action is most likely to call forth a meaningful response.

Clearly this situation will get more complex before it gets simpler -- if it ever gets simpler. Access to justice, no less than any aspect of life now, cannot be restricted in scope to the national level. Our demands for justice are always tempered by the needs of other citizens: that, after all, is a key part of what it means to be a citizen in the first place. The mounting challenge in this new century is going to be finding ways of making sense of citizenship on a trans-national, possibly post-national, scale even as we struggle, as always, to make our local environments civil, well-ordered, productive and pleasant. One likely outcome -- one which, like much of what I am discussing here, is already true in many respects -- is that, as the national level of social organization declines in importance, municipal and transnational levels of organization (or, more accurately, governance) will experience a twinned increase in influence.

### **3. Culture and Conflict**

Given these changes on the larger scene, it is time to accept that we cannot address the political emptiness of our de facto global culture by simply continuing the talk about nations and their laws, or conversely by confining political debate to the local level, however proximate and significant it may appear to us. Those moves, which made sense when the world was still dominated by the nation-state model of a century ago, today simply surrender the larger field to the power of corporations to create and dominate markets, to rape the environment, and to amass profit without regard for the labour which actually creates wealth.

So much is probably obvious. What is not obvious to many people is what, precisely, we can do about it. The task for any useful theory of citizenship now is therefore to provide a sense of meaningful political activity in a world where such activity is ever threatened with meaninglessness. We have to press the internal commitments of globalism rather than retreat from it. We have to make the new cosmopolitan ideal not just a marketer's dream, an image from a Gap ad campaign, but a political reality. We must, furthermore, create a new sense of belonging that embraces differences as well as transcends them, that forges commitment across boundaries without erasing the things that make those boundaries interesting in the first place. Already it is impossible to travel the world without coming across a Disney store or a McDonald's or a Nine West outlet in some public square. We could hardly count it a victory if we simply reproduced that deadening sameness at the level of the citizenry.

A tall order. The persistent challenge set political theory by diverse cultures is how to find a degree of political substance that is sufficient ("thick" enough) to bind citizens, but at the same time sufficiently flexible ("thin" enough) to allow them to pursue their life projects without undue interference. This challenge holds whether we are confining ourselves to a single nation-state like Canada or the United States, or attempting, however boldly, to speak of a larger sphere. When we consider the difficulties that beset even these lower-level political bodies -- the enduring conflicts between the Quebecois and English Canada, the sharp divides and threats of separatism still afflicting blacks and whites in America -- it may seem bizarre to attempt a move

to a higher plane. Is there, could there ever be, a single conception of citizenship that would answer to the needs of those living in Germany as well as those living in Indonesia? Is anything that could even command intelligibility in both places, and in a hundred more besides, going to be much better than an empty form?

To get this argument off the ground, we have to narrow our search parameters somewhat. For the simple answer to the former query is of course: No, there is not a single conception of citizenship equal to the diversities of current nations. For one thing, most of them (Germany is a good example) are rooted in 19th-century ideas of the nation as *ethnos*, as a body of racially similar people. In contrast to earlier notions of the nation as *demos*, a body of politically linked people, these ethnic nations have a built-in charge of vicious exclusion. Hence the gradations of citizenship offered to people who enter contemporary Germany, from the lowly *Gastarbeiter* – the guest-worker, modern-day equivalent of the *Metics* found in ancient Athens -- to the literally full-blooded citizen. Nor is this even an extreme example of political exclusion based on race. For that you have to look to the southeast, to the Balkans; or to central Africa, in Rwanda.

If we dwell too long on these depravities, our confidence that anything may be said or done begins to wane. They are a necessary curb on flights of political fancy, but they cannot be allowed to dominate the field of our awareness. Still, the violent robustness of the ideas of belonging at work in these tortured places would seem to mock the attempt at creating a more inclusive form of citizenship. In the language of thick and thin, how could anything capable of stretching across the range of political contexts be anything but thin to the point of transparency, a flimsy sheet of political naïveté?

What we seek is a form of universalism, and because that has become a danger word in recent political discourse, we must articulate a universalism that will not raise the hackles of those who note, rightly, how most forms of universalism have had oppressive effects. For those even a little unlike the white male rationalists who first defended universalism, the attempt to rise above particularity in search of some higher identity has meant only systematic denigration of their very real struggles for minimal identity. As the philosopher Iris Marion Young has succinctly put it: "[I]n extolling the virtues of citizenship as participation in a universal public realm, modern men expressed a flight from sexual difference, from having to recognize another kind of existence they could not entirely understand, and from the embodiment, dependency on nature, and morality that women represent."

But there is an important difference between covering-law universalism and reiterative universalism – a distinction first employed in the matter of justice by the political theorist Michael Walzer. Covering-law universalism takes a single conception of X, in the present case of citizenship, and imposes it everywhere, without regard for local conditions or needs. As a consequence, it is likely that this version of universal citizenship will be experienced as alien, even actively oppressive, by those on the ground. Reiterative universalism recognizes, by contrast, the pragmatic limits on both philosophical inquiry and political action. It asks not that a single conception, ever unaltered, make way in all cases; only that every case, whatever its particularities, find a way to express a version of the universal value.

So, for example, the current culture of science is ruled by covering-law universalism – or at least is its favoured form of self-conception. But at one time, not long ago, it displayed a much more reiterative form of universalism, since each relatively isolated pocket of empirical investigation was trying, in its own idiosyncratic way and with varying traditional backgrounds, to speak the scientific truth. The notion of scientific truth functioned as a universal value, and

governed each instance of the same kind of investigation, but with a degree of difference that would seem odd, if not dysfunctional, to someone reared in the fluidly global scientific culture of our own day.

But it was not dysfunctional, just locally variant. And the local variations posed no philosophical threat to the value of truth as it then ranged across the different contexts. Hybrid forms are common, even typical, in such circumstances; elements of the universal value mingle with local customs and eccentricities. The value molds itself to the peculiar shape demanded by the local conditions, without entirely losing its coherence -- and, importantly, its connection to other iterations of the same value in other local conditions.

We need not claim that a form of reiterative universalism must "mature" into a covering-law universalism in order to be valid. Science works better because of the extensive communication across other boundaries, true, and it has successfully developed its covering laws. But citizenship, like justice, may not possess the same kind of potential -- and may not have to. Certainly there have been many thinkers, past and present, who thought it did, or ought to. But that is neither necessary nor, in present circumstances, desirable. Such theory-driven desires can cloud our judgment about what is possible, and destroy the value of this distinction by rank-ordering the two forms of universalism, such that the real victory of reiteration is lost. Pragmatism in politics demands pragmatism in theory. We must remain agnostic on the question of whether citizenship will ever achieve the kind of universalism that is currently enjoyed by scientific discourse.

What this means in practice is not something I or anyone could hope to say in quick detail, for it is work not yet done. It does seem unlikely, as I have been suggesting throughout this discussion, that essentialist notions of citizenship will help us here, will indeed erect just the kind of bloodline or basic-trait barriers that make of citizenship, in nasty instances, so viciously punitive. But the standard solution to that impasse, which involves shifting thoughts about citizenship to procedural or constitutional ground, has displayed only limited success. Citizenship can only function if it is perceived and inhabited as a political role, which is to say as a concrete disposition to act.

What I am noting now is just how deep that challenge to act goes, and how difficult the task before us remains. Constructing a stable identity in the dreamscape of our media-saturated world is fraught with overdetermination. There are always too many options, too many choices. Paradoxically, the problems of politics often arise today not in the form of a problem of scarcity, but as one of abundance. We have too much, too many things to choose from, and that effectively distracts us from forming the concrete intentions to address the more basic issue of uneven distribution of things and choices. A surfeit of options may be considered both a blessing and a curse.

But in any event there is one sense in which we have no option: we cannot begin elsewhere than with the surfeited social-cultural environment which already shapes us as what we might call (as the next theme will make clear) "cyborg-citizens."

#### **4. Technology and Humanism**

We have been slow to accept the alteration of our natures through the influence of these cultural factors, including the omnipresent influence of technology. This can be hard to see, especially if we are moved by the apparently liberating possibilities of our now-constant

immersion in technology, the sort of transvaluation of traditional values celebrated by Donna Haraway in her prescient 1985 essay, "Manifesto for Cyborgs." Haraway is no simple Wired-style techno-booster, certainly, but her nuanced discussion of the cyborg future opened up as many troubling possibilities as emancipatory ones.

"The cyborg is resolutely committed to partiality, irony, intimacy, and perversity," Haraway writes in the Manifesto. "It is oppositional, utopian, and completely without innocence. No longer structured by the polarity of public and private, the cyborg defines a technological polis based partly on a revolution of social relations in the oikos, the household. Nature and culture are reworked; the one can no longer be the resource for the appropriation or incorporation by the other."

Haraway's forward-looking analysis became the theoretical ground-zero for a generation of cyber-anarchists, newly wired feminists, and prophets of a transhumanism greeted with both alarm and enthusiasm. Among the last are two significant Canadian thinkers: Arthur Kroker has written darkly and densely about the dangers of the rewriting of the body via technology; while Christopher Dewdney looks forward happily to a time when the species would take its new big step and move beyond the physical.

The influence of technology on the political self is a story which in truth is the story of human history but which tends, in practice, to become the story of the twentieth century. The reason for this truncation in scope is obvious enough, and is symbolized in a few choice inventions which, though in some cases born earlier, only come into their own during the bloody century: the machine-gun, the airplane, the automobile, the telephone, the television, the computer. Mass production and mass destruction are the twinned pinnacles of twentieth-century life, and we still pledge our allegiance to them at every moment.

One consequence of this fact is the current inescapability of capitalism -- something which is sometimes challenged but mostly just accepted, indeed celebrated. Whether we like it or not (mostly not, if the citizens of this country are any indication), our bodies themselves now underwrite the dominance of the market, because every moment of waking and sleeping life is shot through with commitment to the goods and services of the global economy. We are capitalism made flesh.

Another consequence is a profound change in our sense of ourselves, a change best caught by the somewhat misleading label "post-evolutionary." Our mastery of technology means we are no longer beholden to the gene pool, which we can now shape and perpetuate independently of natural reproduction, with all its risks and tempestuous emotions; and we are no longer bound entirely by our natural environment, which we can also shape -- though on the whole we seem bent on destroying it instead. That is one reason the post-evolutionary label is misleading: we are still constrained at the baseline by natural facts, even if this baseline is always shifting because of our ingenuity. The other reason to be suspicious of the label is that we are of course still evolving, if not quite in the manner of crude Darwinian orthodoxy.

What does this entail in politics? First of all, an additional citizenly duty, namely to attend to and understand the conditions of our technological existence -- however painful that may be. It is common these days for those of us in the privileged world to carry on large parts of our existence via e-mail, creating little virtual agoras out of our far-flung friends; or organizing dissent via the decentralized medium of the Internet. But these ethereal movements must nevertheless issue in the still-indispensable actions of shared space if they are to be truly effective. The anti-corporatist protests of June 18 and November 30, 1999, for instance, so

effectively drawn from otherwise diffuse quarters, would have meant far less if they had not led to 40,000 people occupying the streets of Seattle, or 500 of them engaging in the highest form of citizenship, peaceful civil disobedience leading to arrest.

In the face of rapidly changing technology, there is therefore a deeper duty still, to reconceive not only citizenship and political commitment for a new era, but human nature itself. In 1928 the critic Walter Benjamin noted that technology is not, as people often say, the mastery of nature; it is, rather, the mastery of the relationship between nature and humankind. The relationship is now constantly in question, and the question is a political one. That is why the "Transhumanist" prophets of our current "cyborg" status are only half right -- or rather, more accurately, why we have only appreciated half, the unironic and apolitical half, of what they tell us.

Yes, we are all cyborgs now, mixed human-carbon hybrids with wires shooting through our watery bodies at every angle; but we have not yet managed the political implications of this fact, lost in the play of speed and pleasure that the wiring makes possible. We are too much taken with novelty and the 'loveliness' of our inventions, the pure electromagnetic wave-functions of cutting-edge technology. Technology becomes a sort of generalized deity, a wispy but all-pervasive god.

Thus our great avoidance rituals in the face of technology, such that we fixate on the cutting edge and lose sight of the majority stuck on the trailing one. Or, if political issues do come up, the way we imagine they are about something like greater access to hardware -- when they might really be about greater access to the human software of literacy, that indispensable enabling condition of citizenship, that forgotten civil right.

"Our best machines are made of sunshine," writes Haraway. But that is both a virtue and a vice. Lightness and invisibility, the traits of the effective guerrilla, also entail, where power is entrenched, lack of accountability. The genuine citizen-cyborg must send out as well allow in; she must transmit as well as receive. There is no such thing as a one-way communications node. The difficulty with constant information-access and other projects of personal gratification, the difficulty with all these entertaining machines we keep giving ourselves, is not the old one of folding domesticity and privacy away from the public view, making that realm female and subordinate. It is rather that, in being so entirely permeable to the public view, privacy becomes merely an opportunity for conspicuous consumption.

What do I mean? I mean that the very idea of the polis as a shared space, a space where citizens can seek and find the negotiations and compromises that make for justice, is more and more undermined in an ostentatious display of private enjoyment, the old public/private ideology not transcended but simply reinscribed in a new, less obvious manner. Nowadays, political action is not so much prevented as nullified, made supremely uninteresting compared to the local pleasures of the house, of the cineplex, of the playdium. Why should anyone bother with any form of citizenly responsibility beyond the purely personal claim to pay less tax and claim more benefits? Here comfort becomes its own answer, shopping and surfing and e-trading their own defence.

This will not do. We need the separate private realm not only to escape the public now and then, but also to engage more effectively with the shared, common aspects of life -- to make us the sort of citizens who can actively create and maintain the essential third spaces of civil society. Whatever its many dangers and shortcomings, a well-ordered private realm makes a just public realm possible. Among other things, it makes the public/private distinction itself -- along

with a host of other oppositional ideas – a matter for specifically public discourse, a contested border war, for only there can we offer arguments that will be assessed by our fellow citizens -- or those who might be.

Importantly, we do not -- cannot -- any longer expect these conflicts to resolve themselves into some larger notional whole, some form of dialectical completeness. We can only play, in all seriousness, in the space of contestation. "Unlike the hopes of Frankenstein's monster," Haraway says, "the cyborg does not expect its father to save it through a restoration of the garden." This form of utopian thinking is not Edenic. The private realm need not be stark and sparse, as it was for the ancient Greeks, who viewed it as the site of mere necessity, of physical maintenance for the more important things happening elsewhere. But an excessive concern with comfort becomes self-defeating, for it robs the enjoyment of comfort of its point, and its potential role in public justification. The private realm is for solace and rest, to be sure, but at some point these inward projects must be put in service of the larger debate that shapes the whole of social space.

Without that debate, and the legitimacy it alone offers to a specific ordering of space, the purely private realm is mere usurpation, an act of aggression against those less fortunate. Property crimes are most often motivated by need or envy, but they also sometimes have a deeper political point. In effect the burglar or robber wants to know: Where is the justification for you having so much when someone else has so little? And that is not a question that can be answered from the comfort of your own home.

There is, in sum, no political dimension left in the current wave of elaborately evasive private houses and logo-dominated public spaces; no sense of the commitment to a public good - a commitment that the genuinely private house, in its attention to thresholds, actually maintains. Home is a notion that must establish a relationship between private and public; it cannot be an end in itself. The ideal of the cyborg polis must therefore be pursued in better forms. It is, in its way, not unlike the old civic republican ideal of a public space, where every citizen is a model of the whole, a kind of cybernetic network of common projects.

## **5. Speed and Citizen Action**

I realize I have been speaking at a fairly abstract level, and that this may be unfamiliar territory for those used to a more conventional discussion of access to justice. But my concerns are directly related to the overall project of justice, for I do not believe we can think clearly about access to justice unless and until we understand the contours of our cultural and political situation. I also believe that many people, in this country and elsewhere, have a vague sense that their lives are changing very, very quickly but little concrete understanding of what, precisely, that means or what, if anything, they can do about it.

Speed itself is one of the central problems here. It is the dominant trope of the age -- and likely to become even more dominant as we move further into the new millennium. We are constantly told to move more quickly, to process information in greater volume, to react with increased swiftness to the rapid changes in our environment, our economy, our mediascape. This fetishizing of speed is a problem masquerading as a solution, however, for no amount of increased velocity will get us where we think we are going. Where, in any case, would that be? The culture is dominated not just by speed but by senseless speed, a sharp upward vector without a destination. In fact, we are not so much trying to get somewhere more quickly as we are trying

to get away from something with greater haste. What is it? Ourselves? Our sense of unease? Our limitations?

Perhaps all of these. What we must remember as citizens – and this will only become harder to remember as we move more deeply into this new speed-freak millennium – is that speed without direction is only a fool's errand. It has no point beyond itself, in much the same way that so much of the wealth creation we see today seems to have no point beyond itself. We've had many consecutive quarters of growth, and we look set to enjoy more of the same. (This is not always obvious. We are afflicted in Canada by our own invidious comparisons with the United States, which makes us look relatively poor; and there are, to be sure, worrying trends in the matter, for example, declining average income levels compared to the rest of the industrialized world.) But growth is not its own answer. It must have a point, if it is to mean anything, if it is not to disappear in a kind of postmodern legerdemain where nothing signifies anything but itself. Moreover, unbridled growth, the internal logic of capitalism, is ultimately and necessarily self-defeating, for it will eventually – and maybe much sooner than we usually imagine – destroy the very site of its success, the natural environment of this planet.

The point of social wealth must be greater justice for all citizens. That seems obvious when stated so plainly, but what is remarkable today (not only today) is how often that simple point is lost to view. From educational policy to tax strategy, far too much of our thinking is skewed by the crude, and ultimately empty, calculus of short-term utility – and utility of a particularly empty sort, too. A just society is one which allows people to pursue their life goals consistent with the same pursuit being enjoyed by others.

Making that work is a tall order, and one which inevitably involves a measure of disappointment. In a sense, social justice is about the management of existing human desire. It is also about realizing in practice the basic principle that no one should be deprived of the basic goods produced by a society because of natural disadvantages. We want people to be able to succeed, and enjoy the fruits of their talents; but we also want them to share some of those fruits with those less fortunate – because they too are part of the very social fabric that makes success, and its enjoyment, possible in the first place.

The project of realizing the basic principles of justice, of guaranteeing all citizens fair access to justice, has lately become vastly more complicated, more challenging, and more confusing. We now have numerous justice-based obligations beyond the national borders, even beyond the human species, and balancing the different kinds of claims upon us is only going to be more difficult in future. Traditional forms of citizen action are no longer adequate to our desires for accountability and responsiveness. That is, we may have to bypass Ottawa and take our case to Seattle or New York, to APEC or the WTO – and we must be allowed to do so. Moreover, we may have to find our basic accommodations with fellow citizens at more local levels, and in ways that are more fluid and open-ended – ruled by a shared commitment to baseline civility, for example, which makes interaction possible even against a background of deep cultural and personal differences.

Furthermore, we may as individuals have to force ourselves to slow down, to reflect, and to rededicate ourselves to the now-threatened role of citizen, finding new forms and levels of political expression, new ways of being committed and responsive to our fellow-travellers. We may have to do all of this, and more, if we hope to fashion justice from the complicated materials of contemporary everyday life.



## Conclusion

There is much more, probably too much more, that needs to be said about the issues I have raised in these pages. These are not ideas that readily translate into specific policy, I know. What I have tried to do here, and what I invite others to do now, is precisely what is now so essential in the service of justice: to reflect.

We need to make time for reflection, to open up spaces both within ourselves and in our social interactions for thoughts about justice that are not driven, in the first instance, by the imperatives of policy-making or problem-solving. That is not to diminish the need for policy, or for solutions more generally; only to suggest that we make better, wiser policies, and achieve more elegant and more beneficial solutions, when we have given ourselves the benefit of thought. Unlike many of the social goods we seek to distribute justly, thought is renewable and relatively inexpensive – at least in material terms!

It is also, however, perpetually scarce. Which means there is always a need for more of it. I have tried, with these brief notes, to make that crucial form of social growth possible in this forum. I hope I have succeeded.

## **Riding the Third Wave - Notes on the Future of Access to Justice**

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A fundamental principle of the justice system is that it exists for all citizens and legal residents of Canada. The laws and the justice system exist to enable citizens and legal residents to understand their rights and obligations, to enforce the obligations of others, and to take full advantage of the protection of the law.

The phrase access to justice describes a distinct domain of justice policy. The traditional *problem statement* or *paradigm* of access to justice can be stated as follows: guarantees of rights, benefits, and entitlements and of protections under the law are meaningless if mechanisms are not in place to assure access to the means of assuring those rights and protections. Access to justice and fair treatment under the law must be equally available to everyone in the society.

Access to justice is a matter of fundamental social policy. Having full access to the justice system defines an important aspect of legal citizenship. At the societal level, access to justice implies an important connection between justice policy and the broader public policy issue of social cohesion. Full access to justice for citizens implies that they will have a positive attachment to the justice system, expressed as respect for the rule of law and confidence in the justice system. This represents a form of attachment to the society through the central social institution of the justice system. In theory this will lead to a greater level of social cohesion

The access to justice movement emerged as part of the welfare state in several western European and British Commonwealth countries.<sup>3</sup> The emergence of access to justice as part the welfare state is an important defining feature for the access movement. This was the reliance on the state to assume the responsibility for assuring the protection of legal rights, benefits and entitlements. The collective experience of the economic depression that had effected most countries beginning in 1929, and the hardships of the Second World War, probably explain the preference for policies of substantial state involvement in the provision of access to justice services. This history is important because of recent changes in thinking about the role of the state and the role of the community in addressing justice problems.

Institutions for assuring access to justice for the poor assumed a typical form in Canada and other common law countries. In civil law countries, such as Italy, France, and the Netherlands, the state tended to play a very direct role in institutions for the provision of legal services to the poor. In common law countries, on the other hand, the legal profession tended to assume the lead role in the organization and provision of access to government-funded justice services to the poor. This is reflected in the extent to which a case advocacy style of legal aid emerged as the

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<sup>3</sup> There are antecedents to access to justice programs, providing legal assistance to the poor in certain European cities reaching back through the centuries.

main expression of access to justice, dominated by the profession. This is important later as the justice system changes away from a litigious and adversarial model of dealing with justice problems.

In a classic description of the access to justice movement, Cappelletti and Garth<sup>4</sup> identified what they termed three "waves" in the development and evolution of access to justice. The first wave of access to justice, which emerged in the post-war period, was legal aid. The second wave was the representation of "diffuse interests". This includes class actions and public interest litigation, and the emergence of public interest centres. The third wave, according to Cappelletti and Garth, is a more fully developed access to justice approach. The third wave goes beyond case-centered advocacy. It represents a broader panoply of less adversarial and less complex approaches, including changes in forms of procedure, changes in the structure of courts or the creation of new types of courts, the use of paraprofessionals, and changes in the substantive law itself.<sup>5</sup>

When Cappelletti and Garth wrote in 1975, the third wave was just beginning to emerge. The third wave embodied a variety of reforms to the legal system. There was recognition of the need to go beyond legalistic strategies to solve problems.<sup>6</sup> There was also recognition of the need to look at the problems differently. The formal justice system was ill equipped to deal effectively with the complex problems that were being thrown at its door. The legal issue is often only the "tip of the iceberg". In order to achieve effective and durable solutions, the underlying social, cultural, psychological dimensions of the individual's situation must be considered. Integrated and multidisciplinary approaches, involving social, health care and other services, in combination with solutions to legal issues are required.

However, change occurs slowly. Old forms and emerging new forms can coexist for a long time. Twenty-five years after Cappelletti and Garth, we continue to struggle with the problem of reconstructing a more effective justice system. The adversarial and litigious approaches of the traditional justice system remain as important features of the justice system. They are, however, slowly being combined with "holistic" approaches; with restorative justice approaches in criminal justice and with various forms of alternative dispute resolution in civil justice. We are recognizing that multidisciplinary approaches in which the justice system partners with service providers from health care and social services are necessary to develop more effective and durable solutions to justice problems. We are recognizing that affected communities and interest groups are in themselves valuable resources for defining problems and developing effective solutions. There is a powerful case to be made for partnerships between communities, interest groups, health care, educational and social services, and elements of the mainstream justice system in developing approaches to solving justice problems.

The third wave contemplates a much greater range of access to justice approaches than the first and second waves. Access to justice in the first wave can be characterized as lawyer-centered within a litigious and adversarial justice system. The focus was on criminal and civil legal aid for

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<sup>4</sup> M. Cappelletti and B. Garth (eds.), *Access to Justice: A World Survey*, Vol. I, Milan, 1978.

<sup>5</sup> *Ibid.*, p. 52.

<sup>6</sup> Mark Galantner, "The Duty *Not* to Deliver Legal Services", *Miami Law Review*, 929, 1976.

the most serious problems. It has often been argued that needs for criminal legal aid is given the greater priority in resource allocation.

The vast majority of legal problems encountered by members of the public are civil legal problems. The majority of them would not be considered serious *by the justice system*. Most of the people involved would probably not be able to afford a lawyer to represent them in court in any case. They are what the anthropologist Laura Nader has called the “little injustices”. These are important to the people who experience them. They can be persistent and unresolved irritants in their lives. The little injustices are also important on a broader societal level. Respect for the rule of law and confidence in the justice system may be based on people having access to mechanisms to resolve these legal problems. In turn, the presence of these aspects of legal citizenship may translate into greater social cohesion at the broader societal level.

The earlier stages of the third wave emphasized procedural reforms to the justice system. It may be that more recently the "third wave" is breaking in the direction of greater involvement of community groups in providing access to justice services. We are moving away from lawyer centered access to justice, which is primarily case advocacy legal aid. The third wave of the access to justice movement, as conceived by Cappelletti and Garth, contained a clear expression of the idea that legal strategies are not enough to solve the access to justice problems of the poor.<sup>7</sup> This shift appears to broaden the concept of access to justice from providing people with the ability to enforce legal protections and guarantees to resolving the problems that they face, through a combination of legal and non-legal solutions. In turn, this reflects the increased emphasis on multi-disciplinary approaches to access to justice problems in which the justice system develops partnerships with other institutional sectors such as health care and social services. It reflects an increased emphasis on developing partnerships between the justice system and community groups, drawing on the resources of communities and affected groups to better define the nature of justice problems and to develop more durable solutions to them. Access to justice thus becomes an important part of the shift toward a more citizen-centered and community-focussed justice system.

Much to the advantage of the first wave of the access to justice movement, the legal profession has been politically powerful. Legal aid has been well funded by government, with national expenditures growing from about \$15 million in the early 1970's to more than \$600 million in the mid-1990's. Since about 1993-94 national expenditures on legal aid have declined by more than 30 % as governments have cut back spending on access to justice along with general funding constraints. What does this suggest for the future of access to justice if, indeed, it is developing toward a more community-based model?

There are currently many community organizations providing a variety of access to justice services; PLEI organizations, organizations representing the interests of particular groups (women, immigrants and ethnocultural minorities, youth, for example). The ideology of community-centered approaches to addressing justice problems is gaining some prominence, if not hegemony. In addition, it is true that community-based pilot projects in service delivery are

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<sup>7</sup> Cappelletti and Garth, footnote 142. P. 51.

beginning to show concretely that the community-centered approach works. The idea of linkage between traditional legal aid and other providers of justice and other services is taking hold in what may be referred to as a "continuum of service approach". This means choosing from a range of integrated legal and social solutions to justice-related problems, as early as possible in the process, and applying the most appropriate effective solution to the particular problem. There may be a greater degree of integration between traditional access to justice activities, such as legal advice and assistance, and legal representation, and more community-based and citizen-centered approaches.

However, a shift away from the traditional system-based approach to access to justice, toward greater involvement of community associations may not be free of potential problems. From the point of view of users, the problems are that the system of access to justice as it currently exists may be fragmented. There are no easy or well-known entry points. People may not know where to go to begin dealing with a problem. The second problem is one of integration among the variety of services that an individual might need, or they may not be very accessible or widely available.

Community-based access to justice services, that may currently exist or that might be developed, may face some serious difficulties. An environment of financial constraint has become a fixture. The law is becoming increasingly complex. Canadian society is becoming increasingly complex and socially diverse. Clients have more problems and more complex problems. In this environment of increasing complexity of problems, and fiscal constraint, both existing access to justice organizations and new ones could be straining under the load.

Subsequent waves of the access to justice movement have added to, but have not replaced, earlier developments. Legal aid remains a cornerstone of access to justice. Changes in the justice system, of which legal aid is an integral part, are inviting legal aid to reassess what role it will play in a justice system that is less adversarial and litigious, and more holistic.

Law reform and procedural measures to make dispute resolution processes less complex remain important. There is evidence that people tend to reject formal trial procedures in favour of more informal dispute resolution processes where they have "a chance to be listened to, but in a much less formal setting".<sup>8</sup>

As the third wave of the access to justice movement rolls onward, two new aspects may be emerging. One may be an increasing reliance on community-based access to justice services. A second may be an increasing emphasis on holistic solutions to justice problems, in addition to the traditional protection of rights orientation of access to justice. The community-based aspect contributes the considerable resources resident in communities to addressing access to justice issues. In addition, community-based access to justice implies equipping individuals to play a more active role in constructing solutions to their justice problems. The holistic, solution-oriented element adds an interesting new dimension to the traditional concept of access to justice, the protection of rights. How these new aspects integrate with the existing access to justice framework presents a series of challenging questions.

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<sup>8</sup> Seeking Civil Justice, national Consumer Council, London, 1995. P. 11.

## SOME ASPECTS OF ACCESS TO JUSTICE IN CANADA

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"The meaning of access to justice can reflect a wide range of different values and objectives in relation to a great diversity of issues and activities."<sup>9</sup> It would thus be a task of some considerable scholarship and sheer effort to describe the state of access to justice in Canada. It is considerably easier to identify some of the main features of access to justice as these currently exist. This may be useful for people with little familiarity with the concept of access to justice, and the history and development of the access to justice movement. It describes the main elements of access to justice as that term is usually discussed. It will hopefully provide a "jumping off" point in a discussion of what access to justice might be.

**Legal Aid.** By far the largest segment of the "cognitive map" of access to justice is the legal aid system in Canada. Each province and territory administers a legal aid plan that provides legal defence in criminal matters for people who meet financial eligibility guidelines that place them among the very poor and who require a lawyer to assure a fair trial in matters where there is a risk of imprisonment. As well, and in varying degrees, legal aid plans provide legal representation in civil matters, including family, social welfare law, and refugee and immigration proceedings. Again financial eligibility guidelines limit the service to the very poor, and coverage provisions limit the legal matters for which service is available. The range of coverage varies considerably from one jurisdiction to the next.

Legal aid grew out of a pro bono system that prevailed in most provinces up to the mid-1960's. As an expression of professional responsibility, lawyers would take on a few cases per year at no charge for indigent people. Organized legal aid began in some provinces in the mid-1960's. By the early 1970's there were legal aid plans in every province and territory, and a federal program for sharing the cost of criminal legal aid with provinces and territories was in place. In the early 1970's federal funding became available for civil legal aid under the Canada Assistance Plan (now an element of the Canada Health and Social Transfer Agreement).

Legal aid is by far the largest of the access to justice programs in Canada. Total national expenditures on legal aid grew from about \$13 million in the early 1970's to just under \$650 million in 1994-95. Total expenditures have declined to about \$455 million in 1997-98. Total applications for legal aid peaked at 1,128,000 in 1993-94, falling to 802,000 applications in 1997-98.

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<sup>9</sup> Mary Jane Mossman, "Access to Justice: A Review of Canadian Legal Academic Scholarship", Access to Civil Justice, Alan Hutchinson (ed.), Carswell, 1990. P.55.

## **Public Legal Education and Information (PLEI)**

PLEI programs also began in some parts of the country in the late 1960's, mainly in student law clinics and consumer advocacy groups. PLEI is **not** legal advice. PLEI is information about the law and about how the justice system works, designed for lay persons. It can be reactive and problem-oriented or it can be educational and focussed on the democratic principles and values of the justice system. PLEI can be provided by means of several types of media (print, video, internet), and by means of a variety of delivery mechanisms (intermediaries, school programs or telephone law lines). Ideally, PLEI has an "empowerment" dimension. It attempts to equip people to play at least some positive role in the recognition and solutions to their problems, or to participate positively in public debate and discussion about law reform and other justice issues.

The PLEI landscape is considerably more varied than is the case for legal aid. There are many organizations that provide legal information; multicultural service organizations, victim's organizations, consumer groups, environmental groups, gender equality groups, and disability associations provide only a few examples. Some legal aid organizations have a substantial PLEI component, such as the Legal Services Society of British Columbia and the civil legal aid clinic system of Legal Aid Ontario. These organizations serve different constituencies and are funded in a variety of ways. There are 12 core PLEI organizations, one in each province. This national network was developed between 1984 and 1987 under a Department of Justice initiative. Some organizations were created in jurisdictions where none previously existed. In some jurisdictions, existing PLEI organizations were designated as part of the core PLEI network. This assures that there is at least one PLEI organization in each jurisdiction that is a central and sole-purpose PLEI agency.

Data on total national expenditures for PLEI representing all PLEI activities are not available. In 1996-97 the total expenditures by the 12 core PLEI organizations totaled about \$7.5 million. This is less than one per cent of the total expenditures by the 12 legal aid plans.

## **Court Workers**

The third access to justice program that is national in scope is the Native Court Worker Program. The main objectives of the Native Court Worker Program are directed toward both Aboriginal accused persons and the justice system. With respect to individuals, the objectives are to inform Aboriginal people accused of crimes about the justice process that they are involved with, to assist Aboriginal people in seeking legal aid and other services. With respect to the justice system, the objective is to acquaint the actors in the justice system about the cultural and socioeconomic circumstances of Aboriginal people that require sensitivity in the treatment of Native people. Native court worker services are delivered by some twenty, mainly Native, organizations that serve as "carrier" agencies. The cost of the Native Court Worker program is shared by the federal, provincial and territorial governments. Total expenditures are about \$11million nationally.

There are other organizations that provide court worker services for accused persons generally. The Salvation Army, the Elizabeth Fry Society, and John Howard Society all provide at least some court worker services in some places.

These are the three main "programmatic responses" to access to justice in Canada. Legal aid occupies about 99 per cent of the terrain that has been mapped out so far. Legal aid is the most system-focussed of the three. It is, of course, lawyer dominated. It is strongly focussed on in-court representation for what are considered the most serious legal matters. Legal aid is most strongly focussed on access to the justice *system*. More precisely it is access to legal representation within the justice system. The two smaller programs have a more substantive orientation toward access to justice.

### **Court Reform**

A major thrust in the access to justice movement has revolved around increasing efficiency of the courts. It is widely and often recognized that the complexity of the system itself is a major barrier to access to the justice system. In this notion of access to justice, policy makers strive to increase accessibility by increasing efficiency of court processes and simplifying court procedures. This approach to access to justice also includes administrative reforms relating to such issues as hours of operation, location, and structure (e.g. unified courts). The Zuber Report in Ontario provides an illustration of this aspect of the access to justice terrain.<sup>10</sup> It might be said that these types of reforms are aimed primarily at improving accessibility for existing litigants. Bringing access to justice for more people may require additional measures.

### **Alternative Dispute Resolution**

Alternative dispute resolution, or ADR, is an attempt to find more effective dispute resolution mechanisms than litigation in court. ADR encompasses a wide variety of methods. Pre-trial conferences, court-ordered arbitration, "rent-a-judge" firms, small claims courts, divorce mediation, and neighbourhood or community justice councils are among the familiar examples.

### **Pre-Paid Legal Insurance**

The cost of legal services is often said to be prohibitive, for all but the wealthy. Pre-paid legal insurance is one way to provide access to legal services for middle income earners. While legal insurance schemes are common in Europe, they are quite rare in Canada. At least one labour union, the Canadian Auto Workers Local in Windsor operates a not-for-profit legal insurance plan. A few private insurance companies are attempting to market for-profit pre-paid legal insurance plans. At least two Canadian banks make available legal insurance plans. For a monthly fee, legal insurance plans offer telephone advice, follow-up letters, and coverage for specified legal matters such as divorce proceedings, wills, real estate transactions, adoptions, and powers of attorney.

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<sup>10</sup> Zuber, Report of the Ontario Courts Inquiry, 1987.



## **Public Interest Advocacy**

Since the 1960's there have been organizations dedicated to using legal means to address social, consumer, and environmental problems systemically rather than on an individual case advocacy basis. This is public interest advocacy. There are a number of public interest organizations in Canada, such as the Canadian Environmental Law Association or the Legal Actions and Education Fund. Several legal aid organizations will take on public interest cases under some circumstances. Legal Aid Manitoba has a Public Interest Department.

## **Pro Bono Services**

Pro bono services were the antecedents of the modern legal aid system. A considerable amount of pro bono service is still provided. Some law societies and bar associations actively encourage their members to provide free legal services. The Law Society of Upper Canada surveys the pro bono activities of its members. According to the 1998 survey, 24 % of Ontario lawyers reported that they provided some pro bono service. The average was 83 hours of free service per year. The Law Society of Upper Canada, in partnership with the Canadian Bar Association - Ontario and the United Way, provides free legal service to charitable organizations. A similar scheme operates in Alberta. The Manitoba Bar Association operates a pro bono public interest law project to conduct test case litigation. Some pro bono services are targeted at special needs groups. The Alberta Branch of the Canadian Bar Association operates a pro bono advice service for battered women. The Law Society of Saskatchewan operates a pro bono legal service for persons aged sixty-five and over who qualify for provincial income support. Student law school clinics provide pro bono services. Private law firms also provide some pro bono services.

All of these activities provide access to the justice system. There appears to be a considerable amount of pro bono activity in Canada. It is difficult to construct a systematic picture of the nature and volume of pro bono legal services. However, they are a part of the access to justice schema.

## **Concluding Remarks**

This is a brief and incomplete map of the access to justice terrain. In some respects, the map is incomplete because the landscape itself is incomplete. For the most part, what has been described here represents access to the justice *system*, with some exceptions with regard to PLEI and Native court worker services. Legal aid, pro bono services, and ADR provide access to the system. Public interest advocacy attempts to use the legal system to remedy systemic problems.

The concept of justice can be extended into the realm of substantive justice. According to Mossman, this is reflected in the opportunity presented by the Charter for litigation as a vehicle for social change.<sup>11</sup> This may apply to all minorities: women, the disabled, visible minorities,

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<sup>11</sup> Mossman, p.67-68.

homosexuals, and the economically disadvantaged generally. Again, this approach uses the legal system to address substantive problems.

Thinking about access to justice might extend even a little farther. Our conventional concept of justice and how to achieve it is a reflection of the traditional justice system. We may not know as much as we think about the way in which people define legal or justice-related problems, the notions of justice that are held by minority groups or by many ordinary people in the society, and about their preferred approaches to achieving justice. Some scholars have long cautioned us that the *justice system* does not necessarily deliver *justice*.<sup>12</sup> More recent empirical studies point to the fact that people tend to favour more informal forms of dispute resolution because the lack of procedural complexity allows them to "be listened to", and to play a meaningful role in the process.<sup>13</sup>

These thoughts wander even further into the *terra incognita* on the borders of access to justice. Reflecting the superstitions and fears of the times, map makers in the early part of the last millennium would sometimes inscribe at the edge of their known world - "there be dragons here". There is, at least a great deal to be discovered.

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<sup>12</sup> Mark Galantner, "The Duty *Not* to Deliver Legal Services", Miami Law Review, 929, 1976 and Mark Galantner, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change", Law and Society Review, 95, 1974.

<sup>13</sup> Seeking Civil Justice, National Consumer Council, London, 1995.

## **JUSTICE IS A NOUN, BUT ACCESS ISN'T A VERB**

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### **DRAFT ONLY; NOT FOR ATTRIBUTION**

Speaking notes for the Symposium EXPANDING HORIZONS: RETHINKING ACCESS TO JUSTICE IN CANADA sponsored by the Department of Justice of Canada, and held at the Delta Hotel, Ottawa, on March 31, 2000.

#### **Introduction: Justice is a Noun But Access isn't a Verb**

It is, of course, difficult to say much in seven minutes. Especially for a professor who is accustomed to talking in 50 minutes sound-bytes. Nonetheless I shall try. I am honoured to be joined on this panel by Judge Mary-Ellen Turpel-Lafond and Jacques Dufresne. Judge Turpel-Lafond personifies an extraordinary combination of thoughtful, articulate scholar and committed, compassionate judge. We are fortunate to have people like her serving on our courts. Jacques Dufresne, que je connais depuis maintenant 10 ans, est un homme tout à fait remarquable. Philosophe, pédagogue, critique social, polémiste -- il a su, là où règne la noirceur, éclairer la voie que nous devons prendre pour que notre société soit plus humaine, plus compatissante et plus juste.

The key trends identified in the background documentation are those I know well -- all the way from my experience as Director of the Community Law Programme at the University of Windsor in 1975, through work with the Law in Society Programme of the Canadian Institute for Advanced Research in the mid 1980s, through chairing the *Groupe d'étude sur l'accessibilité à la justice* in Quebec from 1989-1991, through my empirical study of the small claims court process in Montreal in the mid-1990s, to my present role as President of the Law Commission of Canada.

What follows is an attempt to distil five short messages -- one drawn from each of these experiences. After 25 years of toiling in the fields of community legal education and access to civil justice, I have one central message. It is this. I once believed that more official top-down law was the only road to more justice. Now I no longer see the challenge in purely instrumental terms. Rather our challenge is much greater. It is to rethink our attitudes and our expectations about who owns law, about what it can realistically accomplish, and about how it can most effectively be deployed to promote a more just society.

#### **I. Information is Power -- Sometimes**

Public legal education can be a double-edged sword. Far from enhancing access to justice, it often winds up enhancing dependency on lawyers, courts and the formal system. Far from educating the system about the legal needs of the public, legal information programmes typically co-opt the public into thinking that they needed the system.

SO THE CHALLENGE IS: HOW CAN WE PROVIDE INFORMATION AND RESOURCES FOR CITIZENS SO THAT THEY CAN MAKE THE OFFICIAL SYSTEM MORE SENSITIVE AND RESPONSIVE TO THEIR UNDERSTANDINGS OF THE REQUIREMENTS OF A JUST LEGAL ORDER?

## **II. "Law in Society" is not the same as "Law and Society"**

"Law" and "society" are not two different things. Law arises in social interaction. The policy objective cannot be to make the recalcitrant facts of social life conform to the neat patterns of official legal regulation. The exclusion of so many people from the presumed benefits of the legal system flows directly from the inability or refusal of official law enacted by legislatures and administered by courts and tribunals to make space for the living law of everyday human interaction.

SO THE CHALLENGE IS: HOW DO WE GENERATE AN OFFICIAL LAW GROUNDED IN HUMAN INTERACTION AND IN THE ONGOING NEGOTIATION OF THE CONDITIONS AND FORMS OF JUSTICE BETWEEN CITIZENS AND COURTS AND PARLIAMENT?

## **III. "Access to Courts" is Not the Same as "Access to Justice"**

Making dispute-resolution institutions more objectively accessible will not overcome the main failings of official law simply because official law is, in myriad ways, the cause of these failings. This is not to argue for privatizing civil disputing. Civil disputes do not have ready labels and characteristics that permit them to be streamed into different A.D.R. processes. Like music, art, poetry, ballet, the movies and dance, the role of law is to take the unarticulated hurts and frustrations of life and give them form whereby they may be framed, argued about and channelled into productive exercises of moral growth for those in conflict. Institutions of official justice meant just to resolve conflict in adversarial and non-restorative contexts have a limited capacity to do so.

SO THE CHALLENGE IS: HOW DO WE RECONCEIVE HUMAN CONFLICT IN A MANNER THAT PERMITS OFFICIAL INSTITUTIONS TO REPLICATE THE WISDOM OF UNOFFICIAL SOCIAL SYMBOLISMS, AND UNOFFICIAL SOCIAL SYMBOLISMS TO REPLICATE THE DEMOCRATIC AND SOCIAL EGALITARIAN VALUES WE ASCRIBE TO OUR OFFICIAL PROCESSES?

## **IV. Diversity and Disenfranchisement**

Even in institutions and processes designed specifically to enhance access to justice such as small claims courts, the paradigmatic plaintiff is just like me -- white, male, non-immigrant, English or French speaking, professional, well-educated, between 35 and 55. Identity and diversity have shown themselves to be enormously complex concepts. Yet the one abiding social differentiator, transcending all other inequalities, is social class. The economic roots of inequality cannot be eradicated simply by enhanced recourse to official dispute-resolution institutions. The standard professional image of law no longer resonates with the Canadian public. The failure of official law to recognize and legitimate diversity argues for recovering pluralism as a means to contest official

law. Access to justice means empowering a diverse citizenry to make, decide and enforce their own law in the multiple sites where they actually find normative commitment.

SO THE CHALLENGE IS: HOW DO WE CREATE A SYSTEM THAT ACTUALLY KEEPS QUESTIONS OF IDENTITY AND DIVERSITY ALIVE IN ITS RULES, PROCESSES, AND PERSONNEL?

## **V. Justice Resides in Human Aspiration**

Law is at once a dynamic and a fragile human accomplishment. It mirrors and partly moulds the moral character of a society. Law is as much the affair of all Canadians, as it is the business of legislatures, courts and lawyers. Citizens know that, however much legislatures, lawyers and courts claim a monopoly on law, it is the unofficial law of their day-to-day lives that underlies a just and respectful society. Canadians renew the law by living the law, often managing to redress the injustices of an official law that Parliament is unable or unwilling to change.

SO THE CHALLENGE IS: HOW DO WE PROVIDE OPPORTUNITIES FOR CITIZENS TO PARTICIPATE MORE FULLY IN LEGISLATIVE AND ADMINISTRATIVE PROCESSES BY WHICH LAW IS MADE?

### **Conclusion: There are no Slogans**

It is always tempting to want to boil down social complexity into slogans -- like efficiency, wealth maximization, and even "access to justice". But we must resist the reductionism of slogans.

Talk of "access to justice" twice displaces what should be our objective. We come to focus on "access" to justice rather than on "justice" itself; and while we proclaim "access to justice" as a goal, what we really mean is "access to law". The most significant concerns about justice felt by Canadians have little to do with narrowly cast legal rights; they have to do, rather with recognition and respect. And the most significant barriers to access can only be overcome through a re-orientation in the way we think about conflicts, rights, adjudication and all-or-nothing judicial remedies; disparities in social power, and not procedural glitches in the processes of civil litigation, are the root of injustice.

Most contemporary proposals to enhance access to justice are simply the reaction of an official system that fears losing its capacity to control to the various other social institutions and practices of civil society where people negotiate and live their own law. The obsessive quest for official legal solutions means that we are now less inclined, and less able, to imagine creative responses to disparities in power, and the challenges of building a just society grounded in deep human affect.

## **From the Rule of Law to Philia**

### **Reflections by Jacques Dufresne in connection with the Access to Justice Symposium, organized by the Department of Justice Canada, March 2000.**

As it is generally posed in public forums, the question of access to justice is a veiled commendation of the legal establishment. Why do persons subject to trial complain that they have no access to the legal establishment, and why do we want to help them, if not because we consider them to have been deprived of a valuable possession. What, exactly, is this possession, and is it as valuable as people are led to believe?

You may have noticed that I have replaced the word "justice" by "legal establishment", which covers courts, laws, rules of law, and the legal professions. When we use the word "justice" with this broad meaning, we sow confusion in peoples' minds and mislead them about the concept of justice. The legal establishment represents one way, and certainly an important one, of obtaining access to justice, but it is only one among many. The Church, the State, and society itself are also capable of playing this role.

Although citizens may not have access to the legal establishment, it, on the other hand, has access to them; it has various extensions - we are tempted to say tentacles - allowing it to infiltrate a variety of activities. It is now present in the most significant and the most intimate activities of our lives: reproduction and death. Birth certificates and wills have been around for a long time, but legal and medical experts have never before played a role more important than that of the father, in terms of artificial reproduction, and that of the family as a whole, in terms of dying in hospital. We have all noticed that, increasingly, children know their rights even before they can read or write, and that, for fear of prosecution, professors keep their office doors open. This is all evidence of the invasive nature of the legal establishment. In this matter, I would refer you to my own work (see "Justice et Droit" from "L'Encyclopédie de L'Agora", available on the Internet.)

I will provide one anecdote to remind you of the American origin of this scourge, which has now invaded Canada and will soon become a global phenomenon. Last summer, a nephew of mine was vacationing at a New Hampshire beach with his wife and their two children. While he was helping his six-year-old son build a sandcastle, an American boy of the same age suddenly appeared. Aggressive, and knowing his rights, this *frontier child* threatened to destroy the masterpiece. The father, raising his voice, made it clear that such an action would have consequences. This was to no avail; one swift kick and the sandcastle was destroyed. The father then approached the young vandal and, without manhandling him in any way, simply held him by the wrist, convinced that when the child's parents arrived, they would side with my nephew. In fact, the mother did arrive, but she was furious with this stranger who had dared to touch her child, an act formally prohibited under New Hampshire law. There followed an incredible police story. The security guard on the beach decided that he was out of his depth, and called in a proper police officer from the next town. After two hours of difficult negotiations, my nephew narrowly escaped an expensive court case, but was forced to apologize to the child. Is it any wonder that, with such laws and in such a climate, the courts are congested?

Apparently, therefore, the legal establishment itself is, to an extent that remains for us to determine, responsible for the demand for legal services. The criticism of such a process, whereby the institution itself creates the demand that it then proceeds to satisfy, has been well established in the case of medicine. I am referring here to *Medical Nemesis* by Ivan Illich, and also to the earlier works of Schipkowensky on iatrogenic illnesses. In the French-speaking world, such criticism has been a part of our great cultural tradition, and indeed of popular culture, since Molière. *Knock ou le triomphe de la médecine* by Jules Romains had a 20-year run on the Paris stage in the early 20<sup>th</sup> century. In that play, a village doctor and a pharmacist, representing the medical establishment, plot together to create a large, faithful clientele for themselves. The healthy man, they proclaim, is a sick man who does not know himself.

Of course, lawyers are also castigated by dramatists, especially in *La Tête des autres* by Marcel Aymé. Yet, although I cannot formally prove my thesis, I believe that I can say that the legal establishment has been analysed to a much lesser extent, in terms of our particular subject of interest, than the medical establishment. As a result, we are less familiar with *nomikogenic* grievances than with iatrogenic illnesses. If the healthy man is a sick man who does not know himself, in our society, which has become as prone to go to court as it is to go to the doctor, the honest citizen is a criminal who does not know himself. Recently in Quebec, the reputation of a professor was forever tarnished by accusations of sexual assault made by a girl and her mother. The court exonerated the professor, a man who had held the respect of all his students for 35 years, but in vain. His reputation had been irreparably damaged.

You may object that charters of rights, as a way of artificially creating grievances, have been the subject of innumerable studies and commentaries. I would answer that the legal establishment is most often behind these criticisms, with the result that we forget that charters of rights have appeared within the context of a logic introduced by that same establishment.

The accusation that I am oversimplifying matters would be justified, if I claimed that the demand for legal services could be explained solely by the power exerted by the legal establishment. As we see for ourselves every day, this is a complex phenomenon in which the media, the public and parliaments often play a decisive role. Out of two billion people, eight children die in a school bus accident, which is practically inevitable at some time, given the number of vehicles on the road. With the complicity of the general public, the media turn this brief news item into a tragedy that could very result in legislation forcing school bus manufacturers to turn the seats around so that they face backward.

This is how the law- and regulation-making machinery works, leading to the oft-quoted remark by the French legal scholar, Jean Carbonnier:

We scarcely see the evil before we demand a remedy; and the law is, *prima facie*, the instantaneous remedy. If a scandal erupts, an accident occurs, or a problem is discovered, the fault lies in shortcomings in the legislation. Just pass another law. And that is what

we do. A government would have to be very brave to refuse to give public opinion this satisfaction on paper. [TR]

A few years ago, during the public debate on the bill to restrict the sale of cheese made from raw milk, I interviewed an expert on the origin of the onerous laws already existing in that sector. He explained that a number of them had been passed in haste as a result of a news item similar to the Nicolet accident, and that they were still in force owing to inertia, even though no one could see their need any more.

I therefore maintain my diagnosis from 1987: the rule of law is rapidly spreading, like cancerous cells, simultaneously invading the spheres of spontaneous sociability and morality. Some will instead say, and the distinction here is more than one of simple shades of meaning, that the rule of law fills a void left, on the one hand, by the displacement of standards of behaviour and, on the other, by the breakdown of morality. Indeed, on the one hand, public justice no longer exists as a prevention tool and, on the other, the coherence and effectiveness of the morality that could control these excesses have now largely been lost.

I could cite a number of authors in support of my diagnosis, including Jacques Grand'Maison, Guy Rocher and George Grant.

My primary purpose today, however, is not to diagnose but to remedy the situation. In my opinion, it was necessary to discuss the diagnosis, in order to make it clear that attempting to facilitate access to the legal establishment, while providing additional opportunities for litigation, is like pouring water into a bottomless barrel.

We must first attack the causes of the problem. Although, as we have just noted, the legal establishment is not the only cause of the proliferation of litigation, this does not mean that its responsibility for the problem is diminished. The legal establishment should speak out whenever a parliament prepares to pass a law for demagogic reasons. Furthermore, it should not come to this, as the legal establishment is over-represented in most governments. On the whole, there is a feeling that, owing to a kind of corporate instinct, lawyers in government do nothing that could weaken the power of the legal establishment, to which they hope to return. An eyewitness told me that when the Canadian Charter was passed, the Charter's sponsor, a government minister who was also a lawyer, informed his fellow members of the Bar of the manna from heaven that awaited them. While this was obviously a joke, you must admit that, as jokes go, it would have been more reassuring if the sponsor in question had asked his fellow lawyers to resist opportunities to enrich themselves at the expense of the social fabric.

For it is the social fabric that is at issue here. In order to deal with our fellow men in a trial situation, we must first become embittered and hardened. Before considering how to facilitate access to the legal establishment, we must find some way of removing the greatest possible number of opportunities for litigation from society itself.

To bring some organization to my ideas concerning this issue, I have designed a table, called the



pyramid of justice.

### **The Pyramid of Justice**

**Court**

**Alternatives**

**Preventive Law**

**Self-regulation**

#### **Principle of Least Recourse**

This table, in which self-regulation is of primary importance, suggests that we should apply to the law a principle similar to that of subsidiarity, which urges us to take decisions to the lowest level compatible with the nature of the issue. In justice, we should respect the principle of least recourse, similar to Hippocrates' basic principle: first, do not cause harm, *primum non nocere*, do not prevent nature from curing itself.

On the subject of what is referred to here as self-regulation or spontaneous justice, note first that, although such a goal appears unachievable in wealthy societies, this does not mean that it is a sign of barbarism. A claim may well be made that spontaneous justice is a sign of the highest form of civilization, and that institutionalized justice is instead the sign of a civilization so preoccupied by production and consumption of goods that its citizens have no time to devote to the single essential aspect of city life: social harmony.

This was the proposition put by the Mexican writer Gustavo Esteva at the symposium entitled "Le droit en question", organized in 1990 by L'Agora in co-operation with the "Chambre des notaires du Québec". To illustrate his point, Mr. Esteva described an incident from the working-class district of Tepito, in Mexico City. A number of foreign female parliamentarians who were visiting the district learned that a serious crime had just been committed: an adult male had raped a young girl. There was an outcry from the distinguished female visitors calling for him to be punished and made an example of by the courts. But there are no courts in Tepito. The punishment is spontaneous. In cafes and public meetings, the offender was shunned. Everyone kept his distance. However, no one saw any point in expelling him from the community to be put in prison and treated as a psychiatric case. Apart from his passion for young girls, he was an outstanding citizen. On work crews, he was always the most efficient member. Some time passed. A young girl consented to marry him. Under these conditions, the victim and her mother agreed to make their peace with him.

No discussion of spontaneous justice would be complete without referring to the Amerindian justice system. "To maintain social order, wrote Robert Vachon and N'Tsukw, the aboriginal process involves neither legislation, nor a judge's decision, nor coercion, nor physical punishment, but custom and group persuasion. The judicial process itself is designed more in terms of re-establishing the natural order than of eventually punishing the offender. This is not a formalized judgment involving a court, an actual judgment and a conviction, but an informal judgment by public opinion." [TR]

Obviously, it is impossible to artificially recreate a social fabric that would make such self-regulation possible in a wealthy society. This, however, does not justify the prohibition of self-regulation, where standards of behaviour make it still possible. Most important, this does not detract in any way from the credit of those who, understanding the dangers of institutionalization, take upon themselves the job of watching over both the roots of traditional sociability and its new growth.

Through the intelligent use of background information on attitudes, as well as fine-tuned social intervention, we can successfully identify healthy forms of sociability and create the conditions for sensible intervention, in order to either prevent litigation or encourage its resolution more quickly, humanely and fairly.

The general public and judges could also be provided with principles likely to encourage an interpretation of the law favourable to community life. For example, the principle of hospitality could be introduced. Another of my recent experience revealed the need for such a principle. We made the acquaintance of a French teenager on a work term in our region. She dreamed of spending a few days in Montreal but did not have the money to pay for a hotel room. We appealed to the hospitality of relatives and acquaintances on her behalf. They all refused, in most cases for fear of legal proceedings if there was an accident. When we see minors suing their own parents, we can certainly expect the worst in the case of a foreigner. Imagine the obstacles that arise when the person in question is disabled. The principle of hospitality that I have in mind would be such that any person who offered hospitality in good faith could only be held liable for an accident occurring in his home in extreme cases of wilful negligence. This would dissuade many a crank from commencing legal proceedings.

A few years ago, in downtown Cambridge, Massachusetts, just a stone's throw from Harvard, a park was closed to children, because liability insurance was too expensive. Shouldn't the principle of civic-mindedness apply in such cases?

A friend of mine told me that a young secretary had stolen nearly \$15,000 from his business. He had proof, so that the young woman was liable to a year in prison. But she was from the neighbourhood, he had watched her grow up and knew her family well. He found a neighbourly solution. In the presence of two neighbours sworn to secrecy, the young woman admitted her theft in part. Pleased with the turn of events, her boss then agreed that she could repay that part of the theft, without interest and over a lengthy period of time, so that she could fulfil her commitments without having to steal again. My friend was well aware that an unscrupulous lawyer might have accused him of intimidating the woman in order to deny her access to justice.

But the procedure was satisfactory to everyone. My friend avoided substantial legal expenses and an enormous waste of time; the young woman avoided the scandal of a criminal proceeding. Note that she scrupulously fulfilled her commitment for five years. In this type of case, the neighbourly principle should be applied.

Plato conceived of a similar solution for divorce cases. He provided for a jury that would also offer marriage counselling, with a decidedly interventionist cast. It would consist of ten men and ten women, primarily to perform the following function: if the adjudicators were able to reconcile the couple, they would be formally reconciled; "but if their souls are too much tossed with passion, they (the adjudicators) shall endeavour to find other partners " 1. I need not remind you that Plato did not like lawyers very much. As he said, they belonged, along with sophists, in the category of those who used their power of speech to win a particular cause, whether just or unjust, in exchange for gifts. The legal profession, he concluded, should be prohibited: "Now in our state, this so-called art, whether really an art or only an experience and practice destitute of any art, ought, if possible, never to come into existence, or if existing among us... go away into another land" 2.

## **Preventive Law**

As we can well imagine, the border line between self-regulation and preventive law is somewhat blurred. Montreal's centre for preventive law was created as a result of our symposium entitled *Le droit en question*, under the auspices of the "Chambre des notaires du Québec". The centre is responsible, *inter alia*, for providing a free legal information service. This is a step in the right direction. We should note in passing that the notary, member of a profession unknown in British North America, is a preventive law officer. We invited Marc Galantier, an American specialist in preventive law, to attend our symposium. He left having been convinced that the profession of notary would be very useful in the United States. A proper contract in the presence of a notary who has done his job properly considerably reduces the risk of litigation. But rather than strengthening this venerable profession in the only region of North America where it still exists, we appear to be trying to replace it by the profession of lawyer, which is gradually ceasing to be a liberal arts profession. The typical lawyer is now either a businessman or a legal technician.

Unfortunately, the centre for preventive law has refused to apply, even on an experimental basis, an idea that I borrowed from an obscure member of Parliament from the late 19<sup>th</sup> century. He had achieved passage of a "conciliation" law, allowing leading citizens in remote regions to act as judges. You may recall that, at the time, two farmers from the Gaspé region who were involved in a dispute over a fence had to go to Kamouraska to have their case heard.

The Chicoyne Act resolved the problem of access to justice caused by geographic remoteness. Today the remoteness is financial or cultural. To reduce this remoteness, perhaps we should consider simpler, less professional, and more efficient measures than, for example, mediation in separation cases. For this purpose, I proposed that the centre for preventive law provide basic legal training to a few volunteers among the leading citizens of the village or community, who

would then be authorized to provide basic legal services within their community. In the past, I was interested in alternative medicines. In my opinion, there was also a place for *alternative forms of justice*, which had already spontaneously begun to appear. I was told at the time that, in Ontario in particular, a number of retired policemen were practising alternative forms of justice.

Preventive law could also play a role in the administrative sector. A few years ago, I was invited to speak at a conference of the Appeal Board of the CSST (workplace health and safety commission [TR]). I knew that an alarming number of files were pending and I could not recommend increasing the number of board members to resolve the problem, before examining the situation carefully. I was given no explanation of any of the various documents made available to me. Everything became clear, however, when a senior staff member, more forthright than most, explained that the initial interview with workers injured on the job was conducted by staff who had received no special training but were asked to help the applicant complete an anonymous form. In other words, the workers came up against a brick wall when they arrived at the CSST. This was the source of the workers' sense of unfairness. The best-trained employees within the organization, for the most part doctors and lawyers, were clustered at the top of the hierarchy. From this, a cynical observer would have concluded that the institution had been organized so that the maximum possible number of disputes rose to the top to occupy the greatest possible number of senior staff. My informant was convinced that a little more hospitality, flexibility and judgment at the reception level would have eliminated most of the complaints, even before they materialized.

Before attempting to prevent disputes, as in the case of the CSST, we must consider whether it is possible to create or re-create alternative solutions.

## **Alternatives**

As you may have noted, I distinguish between preventive law and what are referred to as alternatives. I include in the latter mediation, arbitration and what is generally referred to in the United States as informal justice. On this point, I will simply cite the conclusions of an American expert in the matter.

After pointing out all its contradictions, Richard Abel praises informal justice: "[...] it expresses values that arouse deserved support: harmony rather than conflict; mechanisms accessible to the many, rather than privileges offered to the few. It operates swiftly and inexpensively; it allows all citizens to participate in decision-making, rather than restricting authority to professionals; it is convivial rather than esoteric; its purpose is to restore all the authenticity of justice to those who would otherwise have to make do with purely formal justice." [TR]

## **The Court**

The court and its judges sit at the top of the pyramid of justice. Concerning the judges, we are merely the latest of many to recommend the greatest possible reduction of the importance of political criteria in the appointment process.

Perhaps we should also ask that judges, as they become increasingly competent, be given increasing time to devote to exemplary cases. Then their judgments could form the base of the system and become a source of inspiration for preventive law specialists.

Only in this way can we hope to reverse the current trend, in which the court is perceived as the base of the pyramid, when it should be the apex.

In order to make our courts more accessible, both psychologically and morally, we might draw a few lessons from the Athenian example. Access to justice was not a problem for citizens when they themselves were at the heart of the legal establishment, since they acted as their own lawyers and occasionally had to serve as judges. I recommend that all you distinguished legal scholars, who have listened to me so patiently, read Aristophanes' play *Wasps* very carefully. If a genuine effort were made to make things easier for citizens who wished to conduct their own defence, the problem of education might be solved at the same time. Indeed, Athenians learned to read, write and speak in public, in part because they needed all those skills to enjoy all the advantages of citizenship.

### **Locke or Aristotle?**

My proposed changes could only be achieved in an appropriate philosophical climate. Can this climate be the liberalism referred to by Mr. Kingwell at the start of his discussion paper? When I wrote *Le Procès du Droit* [the law on trial - TR], I was not sure. After reading *English-speaking Justice* by George Grant, I am now convinced not only that the remedy is not to be found in liberalism, but also that the ideas of Hobbes and Locke, made worse by John Rawls, are the distant but omnipresent cause of the social evils behind the inflation in demand for legal services.

A good society is based on order, justice and a friendship peculiar to communities, referred to by Aristotle as *philia*.

When justice, in the form of the legal establishment, takes up too much space and *philia* too little, the situation becomes unhealthy and conducive to litigation. What can we do to restore to *philia* its lost importance?

In order to answer the question, we must begin by making a perilous detour through philosophy.

First, we must be prepared to trust in human nature, which, according to Aristotle, is fundamentally good. For most of us, this implies asking difficult questions about the modern ideas by which we have been shaped. According to Aristotle, man is a *zoon politikon*, literally, an animal who dwells in the city, a sociable animal, which leads to the following interpretation: if no impediment is placed to the expression of his nature, he will spontaneously show *philia* toward his fellow men.

This concept of man served as a basis for a concept of justice that was central to western tradition for over a thousand years. With this concept, which led directly to Roman law, the idea of justice was subordinate to the idea of good, and human nature was subordinate to God.

But, just as there was a Copernican revolution in cosmology and philosophy, so too was there one in law, introduced by two British philosophers: Hobbes and Locke. Doubtless, too many crimes had been committed in the name of divine justice. A more down-to-earth approach appeared more prudent. As a result, since Hobbes' time, we have believed that brother will turn on brother and, from Locke through to John Rawls, that justice revolves no longer around God, but around the interests of the individual, who is primarily concerned with his survival, i.e., his security. In *English-speaking Justice*, George Grant clearly demonstrates that, for both Rawls and Locke, justice is "fairness in the self-interest".

How should we translate the word *fairness* into French? Since it relates to respect for the terms of a social contract, which are comparable to the rules of a game, we can use the French word *honnêteté*. The good player is one who does not cheat, who is fair. But his fairness is in defence of his self-interest! This is John Rawls' definition and, although he appears as a successor to Locke and Kant, he stands, first and foremost, within the ranks of the British analytical philosophers. Any reference to human nature, or to a transcendental concept of justice, has been removed. We are left only with the observation, made earlier by John Locke, the founder of liberalism, that the first thing that a reasonable living being seeks to ensure is his own survival. For the author of *The Theory of Justice*, the fundamental issue is to define the conditions under which each person can best ensure his survival in a social context in which everyone has the same motives.

More fundamental than fairness, this concept of justice stresses the individual and his security. This is one paradox of liberalism, since it is based on the opposite of freedom. Extending our analysis of society's tendency to go to court a little further, we discover that the need for security is almost always an issue, either directly or indirectly, and that it becomes exaggerated as man, moving further away from God, becomes the absolute. Since he no longer finds security in God, man has deified security. In the meantime, the fear of the other, i.e., the other sex, the other generation, or the other ethnic group, becomes stronger. Sartre's aphorism borrowed from Hobbes, "Hell is other people", was prophetic. If society's tendency to go to the doctor is caused by fear of germs, its tendency to go to court is caused by fear of others ... (and, often, of their germs). The ultimate cause of both phenomena is an excessive need for security. Individually and collectively, we cannot escape the domination of medicine unless we accept our mortality and bow before the evidence: the value of each human life is not unlimited. We can only escape the domination of the legal establishment in the same way.

In order for *philia* to be restored in those places from which it has disappeared, first and foremost, a philosophical climate must reign in which security ceases to be the absolute that it now is. Such a climate exists within the family of my neighbours, who have 12 children. A short time after the bus accident in Nicolet, the father was pulled over by a policeman, because only three of the five children in the back of his Chrysler were wearing seat belts. You can imagine the father's reply: "What do you expect, officer, there are only three belts". The police officer warned him that, next time, he would impose a severe fine rather than letting him off with a warning. At this rate, my neighbours will soon only be able to travel by train or bus!

Commenting on the panic aroused by the accident, my neighbours expressed wisdom worthy of Aristotle. "It is as though, they told me, people have forgotten that they are mortal and so, when they are reminded of this fact by an uncommon accident, they try to banish the spectre of death by calling for utopian security measures". Just as they were telling me this at their sugar shack, I saw a small patch of colour racing down the hill on the other side of the stream. It was their youngest boy, Robert, just three years old, who had come to find his parents on his own, over half a kilometre from the house. "He will have wonderful memories of this", said his parents, rather than worrying about the accident that might have befallen him.

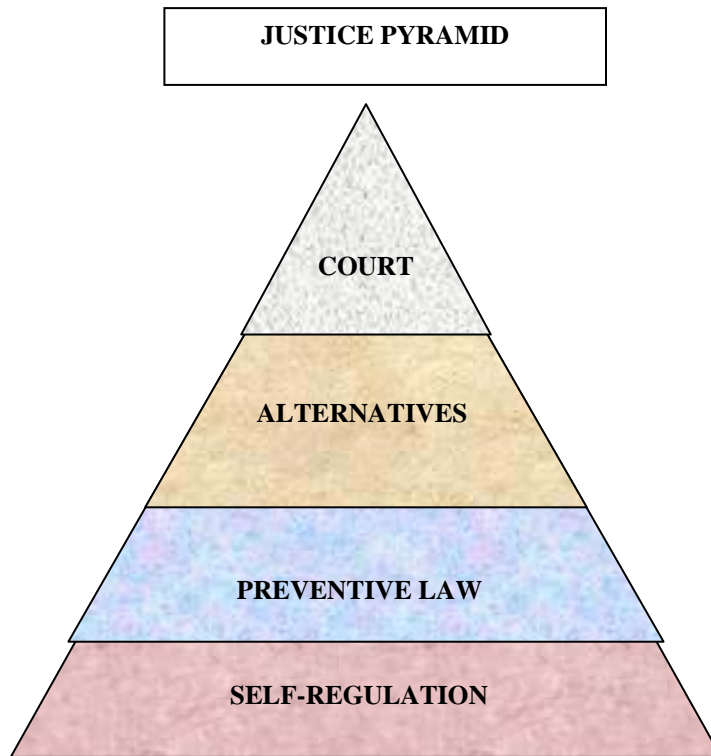
Once this philosophical climate has been re-established, a range of simple measures to ease the legal burden will become possible. The simple solution is to practise social Hippocratism. Nature cures itself, taught Hippocrates. We must only strive not to harm it. *Primum non nocere*. The same holds true for man's social nature. Remove the obstacles and philia will reappear.

We have a civil liberties union and innumerable agencies to watch over the security of our citizens. The time has come to watch over philia, by encouraging the creation of citizens' groups responsible for reducing our fear of others and its corrosive effects on the community, for example. How? Perhaps by identifying acts and regulations that are harmful to community life and recommending their repeal or amendment.

With this in mind, we, along with some friends from Vancouver who work with the disabled, and with the support of the McConnel Foundation, have launched the "Philia" project to recreate the social conditions for philia.

1. Plato, *Laws*, 930a.

1. Plato, *Op. cit.*, Book IX, 936a.



This table, as we said, suggests the following general principle: given the inability of individual citizens to prevent a dispute from occurring, that, insofar as possible, it be resolved spontaneously by society; that in situations where, despite all attempts to avoid it, the risk of a dispute is high, the services of a preventive law specialist be used, i.e., either a notary who, as a public official, is in reality a judge before the fact, or a lawyer who assumes a role similar to that of a notary.

If the dispute occurs despite all these precautions, the first step must be to try and resolve it through procedures that are less formal and severe than court proceedings, yet still guarantee that justice will be fully done. These proceedings are, in order of application, conciliation, mediation and arbitration. Private settlements are the procedure of last resort because, of all the procedures, it has the greatest potential for the use of coercion.

Under these conditions, only disputes that absolutely could not be settled by other means, and that would, insofar as possible, have an exemplary value, would go to court.

Preventing disputes through more ethical behaviour and improving the quality of the social fabric may appear to be a nebulous and remote solution. However, we would simply repeat that, without such change, all the solutions that appear, at first glance, to be more detailed and concrete will quickly lose their promise.

This does not mean that we should not even try to find solutions. What it does mean is that the effort we must expend will be even more productive if it is accompanied by a more radical ethical renewal.



## More or Less? The Economic Perspective

**Stephen T. Easton**  
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**and Adjunct Scholar, the Fraser Institute**

It is a truism that the citizenry should have access to justice. It is also a truism that wants and needs are unbounded. The important question is what constraints are to be put on the process of obtaining enough justice. Once the dust settles on the kinds of things we want people to be able to do in principle (and of course in law), the number accessing justice programs evolves into the question of who will pay – the taxpayer and the litigants/defendants, or just the taxpayer? And once it has been decided that the taxpayer rather than the affected parties will pay for litigation, then the only issue remaining is “how much?” both in aggregate and on a case by case basis since the budget will always be exhausted.

Consequently, my role as an economist is to suggest that even with new program spending (and especially were Justice to remain within the current envelope), the economic principle of tradeoffs among alternatives should be on the table nonetheless to evaluate the potential candidates for expansion.

We need this principle. A quick review of Canadian justice today emphasizes the pitfalls of doing without the basic notion of tradeoffs.

There are a number of interesting facts about Canadian justice.

First, the number of lawyers in Canada continues to rise. As of 1997 there are 67,961 lawyers on the rolls of Canadian law societies. Since 1991 this is an expansion of 21% in the number of lawyers even though the population grew less than 8%. From 1991-1997 the number of lawyers per 100,000 of population rose from 199 to 224. We have reached the ratio of lawyers to population that was found in the United States in 1981. To put this in local perspective, between 1993 and 1997 the number of physicians in Canada *declined* from 189 to 183 per 100,000 of population.

Second. With the declining crime rate, there are fewer criminal cases in the justice system. During the past decade, the actual *number* of criminal code infractions known to the police has fallen by 15% (as opposed to the crime *rate* that has fallen by 22%.)

Third. Civil litigation, about which remarkably little is known, has probably continued to grow after 1993 which was the last year for which systematic evidence has been gathered.<sup>14</sup> Over the previous decade civil litigation costs were increasing at a rate of (inflation adjusted) 2.3 percent per year. Governments (at all levels) were the most important contributors to increased civil

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<sup>14</sup> Lippert, Easton and Yurish, 1997, “Trends in Canadian Civil Justice” in John Robson and Owen Lippert eds., Law and Markets: Is Canada Inheriting America’s Litigious Legacy? (Vancouver: The Fraser Institute, 1997).

litigation. It is unfortunate that more recent data do not exist. In the same way the crime rate increased and then began to fall in the early 1990s, it is important to know whether civil litigation continued to increase – something that I view as very likely – or actually declined in concert with the criminal caseload.<sup>15</sup>

**The Recent Past.** The past fifteen years have provided an object lesson for the expansion of legal services by governments. On the one hand there is the fiasco of legal aid where the great expansion of the 1980s and early 1990 was suddenly replaced by an equally sharp contraction. It is not credible that booms and busts in legal services are being made in any rational way with such gyrations in both funding and service. On the other hand, we have the operation of much of the rest of the justice service system that has been remarkably stable in the face of both rising and falling demands for service.

Table 1 reports total spending on different categories of justice services in real 1999 dollars (to adjust for inflation).

Table 1 The Cost of Justice Services: 1988-97 (millions of 1999 \$)					
Year	Police	Courts	Legal Aid	Adult Corrections	Youth Corrections
1988/89	5621	820	384	1893	456
1989	5717	na	416	2018	486
1990	6110	892	480	2086	505
1991	5983	na	567	2064	519
1992	6209	942	654	2042	531
1993	6177	909	634	2005	542
1994	6158	889	688	2017	560
1995	6054	883	648	2000	529
1996	6005	879	550	2019	526
1997	6045	na	459	2096	504
Source: CCJS <i>Juristat</i> 17(3), p.9; and <i>Juristat</i> 19 (12), p.4. *Peak years in bold.					

What is particularly interesting is that movement in total real expenditures on the police, the courts and corrections are relatively gradual while legal aid costs are comparatively variable.<sup>16</sup>

<sup>15</sup> Recently the Canadian Centre for Justice Statistics looked into the operation of four jurisdictions and has added immeasurably to our knowledge of the details of civil actions and court activity although they did not focus on the broader picture.

<sup>16</sup> Additionally, in legal aid there has been a gradual return toward more criminal and less civil legal aid as a proportion of total expenditure. The trend is particularly marked in Ontario, but is also present in most of the other provinces even though the actual number of applications for criminal legal aid has been declining – as might be expected with the falling number of crimes and crime rate.

Expanding Service. This leads to the question: What kind of budgeting exercise is reasonable in the face of a desired expansion of service? It is easy to spend money. There is no lack of applicants with unmet needs if a government is willing to pay the freight – a look at the history of legal aid proves that. But can services be expanded in a way that is both meaningful to the recipients and to the taxpayer? I think that the answer is “Yes,” but it requires going well beyond Table 1’s statement of spending.

For example, a basic criterion is that when more money is to be put into a program, the benefit from the service level increase should be commensurate with the increase in funding.

This means that there has to be a notion about what constitutes the service level. In the case of the police, we might imagine that it has something to do with the number of crimes. In the case of corrections, it has something to do with how many people are sentenced to incarceration for crimes they have committed. In the case of legal aid, it has something to do with how many people are serviced in criminal (and civil) cases. To be sure, these are relatively crude measures. After all, we want the police to catch criminals and deter crime; we want courts to process people justly as well as efficiently; and we want prisons both to incarcerate and to discourage recidivism.

Regardless of what criteria we choose for expansion, we need to be assured that the benefit from an additional dollar spent on legal aid, for example, should be as beneficial as the additional dollar that could go to the courts, the police or corrections.<sup>17</sup> Otherwise it would be more sensible to increase the dollars flowing to the courts, the police and corrections before increasing the flow to legal aid. At current service levels, if there is a specific program that provides demonstrably higher benefit, then expand that service.

To operationalize this principle, we need to be able to characterize service cost. Table 2 *illustrates* one such characterization: the dollar cost of each service is deflated by the number of crimes known to the police.<sup>18</sup>

For many, but not all, of justice's functions, the number of crimes known to the police is a basic source of demand.

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<sup>17</sup> In a larger context we should see it as competing with health care and education. But for the purposes of today's discussion, we can remain in the Justice envelope.

<sup>18</sup> Deflating by the number of crimes known to the police is only one way to characterize the service flow and is meant to be illustrative, not definitive. It is by no means the only way to characterize service flow. Other more sophisticated characterizations are obvious but beyond the scope of this note.

<b>Table 2</b> <b>The Cost of Justice Services</b> <b>per</b> <b>Crime Known to the Police</b> <b>Measured in Constant (1999) Dollars</b>				
<b>Year</b>	<b>Police</b>	<b>Courts</b>	<b>Adult Corrections</b>	<b>Youth Corrections</b>
1988/89	2352	343	792	191
1989	2357	na	832	200
1990	2326	339	794	192
1991	2064	na	712	179
1992	2180	331	717	186
1993	2258	332	733	198
1994	2327	336	762	212
1995	2294	334	758	201
1996	2271	332	763	199
1997	2389	na	828	199

As Table 2 describes, the costs of justice relative to the number of crimes known to the police have been remarkably constant over the past decade. That is, the fluctuations in cost per unit service are neither systematic nor follow obvious trends. Relative to the number of crimes, the costs of Canadian justice have been stable relative to the "demand" for service.

As it is the only cost that is actually at a maximum in 1997, Table 3 reports data about corrections for the past two decades: the number of criminals in custody at federal and provincial facilities over the past twenty years *relative* to the number of criminal code violations.

<b>Table 3</b> <b>Inmates per 1000 Criminal</b> <b>Code Violations</b>			
<b>Year</b>	<b>Inmates</b>	<b>Year</b>	<b>Inmates</b>
1978	12.8	1988	11.5
1979	11.8	1989	12.0
1980	11.0	1990	11.1
1981	11.1	1991	10.6
1982	12.2	1992	11.1
1983	12.6	1993	12.0
1984	12.9	1994	12.7
1985	12.6	1995	12.8

1986	11.8	1996	12.9
1987	11.2	1997	13.0

There has been very little change in the proportion of those incarcerated relative to the number of criminal code violations. So what does this mean?

These data indicate that there is a stable association between these categories of expenditure and the underlying source of the demand for service that, in this simplified exercise, is taken to be “known criminal code violations”. The costs and service levels in our justice system are, by and large, stable. There are not great and sudden changes in costs relative to a basic measure of service.

There is no such stability, however, between crimes and legal aid, and although not presented here this is true even for criminal legal aid. Table 4 displays the cost of legal aid per known crime.

<b>Table 4</b> <b>Legal Aid per</b> <b>Crime Known to</b> <b>the Police</b> (1999 Dollars)	
<b>Year</b>	<b>Legal Aid</b>
1988	161
1989	172
1990	183
1991	195
1992	230
1993	232
1994	260
1995	246
1996	208
1997	181

In contrast to the stable patterns of expenditures in the other categories of justice spending in Canada, legal aid spending per crime has been highly variable. If there is additional spending to be done in this division of Justice, then some rationalization of service levels is desirable. To justify expanding service, a case has to be made that a dollar spent here is worth *more* than a dollar spent in the other components of justice. It would be very difficult to rationalize expanding a service that has been so variable unless it can be shown that a dollar spent on this form of justice yields a better outcome than an additional dollar spent among policing, corrections and the courts.

So what is the framework? To expand service in any one sector of spending, prove that the present cost per unit of service benefit in that sector is lower than the costs of expanding service

in all of the other sectors. Legal aid aside, it is likely that with an extra dollar to spend, you would tend to distribute it across all the activities that have provided stable levels of service in the past rather than choosing one (winner) to expand. This prescription is bland, but it is the correct one if you are duly diligent. With legal aid, the case must be made that by expanding service you are improving access to justice better than by improving the courts, the police and corrections.

## **New Partners and New Delivery Mechanisms Speaking Notes**

**Lois Gander**  
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We have been invited today to consider afresh the question of how to improve access to justice in Canada – to “think outside the box” as the expression goes. We have not been assembled for this task because we are some learned society that amuses itself by pondering the imponderables, but because we believe that our current legal system is in critical need of repair or renewal.

For many of us, access to justice is not a new theme. We have been or are involved in the legal services movement with its promise of expanding access to the legal system whether through legal aid, native court worker services, or public legal education. Or we are law reformers, equality seekers, victims’ advocates, or mediators struggling to make the law have more meaning for people disaffected by the current system.

We know from these efforts that we are only working around the edges of the problem of accessing justice rather than getting to its core. Our legal theorists confirm our suspicions that the legal enterprise is deeply flawed. We find ourselves asking **what** access to **whose** justice? So we must heed Einstein’s caution that we cannot expect to solve a problem with the same kind of thinking that created it. If we want to get to the root of the problem of our legal system, think outside of the box we must.

Getting out of the box, on the other hand will be no easy matter. We have a great deal invested in the current system and much to lose in abandoning it. We may also have to think in ways quite foreign to us, ways that may seem absurd, fanciful, or foolish. We may need to set aside the analytical tools that normally sustain us, in favour of less familiar processes of reflection, introspection, and lateral thinking. Today’s discussions can only be a beginning, uncertain and halting, as we seek even for the questions we should be asking.

Our charge in this discussion group has been to consider who ought to be our new partners in our journey toward justice and in what new ways might we delivery our reconceived notion of justice. I propose that we begin by asking ourselves three questions:

Why do we now find ourselves in need of such deep reflection on the state of our legal system?  
Who needs to be involved in renewing our justice system?  
How will we deliver this new justice?

Considering these questions might help us remain connected to the best of our traditions, while pushing the justice project forward another step.

## WHY NOW?

To start that discussion, I would suggest that the challenges facing our legal system today have been provoked by a variety of factors, some of them contradictory and conflicting:

- The public is increasingly dissatisfied with the law and the form of procedural justice it promises. Our system promise us our “day in court “– our chance to present our case to an objective judge in accordance with established procedural safeguards. But our system doesn’t actually help most people get to court on most of their claims. Legal aid is limited both as to coverage of matters and financial eligibility. It leaves both the poor and the middle class without assistance on a host of important legal matters. As for that objective judge, what good is she if the rules are so complex, the evidence so unstable that the outcome of my trial is so unpredictable as to be a “crap shoot,” as even judges have characterized the event? What good is procedural justice if the laws themselves are not just, if they favour the strong against the weak? Or if the best lawyer wins no matter the merits of the case; if the process can be manipulated by an unscrupulous lawyer who uses the very procedures of justice to wear down the righteous party? Procedural justice is a myth with little contemporary suasion.
- We can not dismiss these complaints against the legal system as being the inevitable consequence of an adversarial system that by its very nature must produce both a winner and a loser. Not just the losers are complaining. The winners, the witnesses, the jurors, the spectators, the analysts, and the public all see the system as failing. Increasingly lawyers and judges are losing faith with it as well.
- The equality provisions of the *Canadian Charter of Rights and Freedoms* have created the expectation that the law can deliver, not just procedural justice but substantive justice, raising the legal stakes considerably. Yet the courts’ decisions in delivering substantive justice have been as controversial as those delivering procedural justice. Canadians don’t seem to be as ready for this kind of justice as our Charter suggests.
- Recent concern regarding youth violence and before that, parolee violence, has fuelled public dissatisfaction with both the retributive and rehabilitative functions of the criminal justice process. The law seems to offer us too little protection against the lawless.
- The multicultural makeup of Canada means we have widely divergent experiences with fundamentally different legal systems leaving us with no public consensus on the meaning of justice. There is no shared understanding of the roles of the various players in the legal system; no shared history, romanticized as it may be, of the struggle to establish the rule of law as a cornerstone of democracy; and no shared commitment to its continuation.
- Canada has become a “rights based” and litigious society. Canadians turn to our flawed legal system with increasing frequency and urgency to resolve an ever-expanding array of problems.
- Maintaining a legal system with these demands on it requires an increasingly complex and expensive administration for which the public is less and less willing to pay. As the public sees it, they are being asked to pay more and more for a system that is increasingly dysfunctional.



- The public's resistance to paying for the legal system is matched by the litigant's increasing inability to pay to play the legal lottery. The legal system is inaccessible not only to the poor but to the middle class as well. The cost of legal services bears no relationship to the benefits delivered.

- The erosion of our sense of ourselves as social beings and as citizens capable of perceiving a public good that exists beyond our private self-interests has rendered us merely consumers of services, even government services like our courts. Our recourse is to complain about the service that we receive, not take responsibility for it.

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- The dominance of multinational corporations threatens to make all talk of citizenship and rights of little consequence creating a sense of urgency about asserting our collective authority.

- By calling into question the meaning of meaning, post-modernism challenges the complacent acceptance of our current, positivist concept of law. Legal positivists would have us believe that the law is the law is the law. But post-modernists tell us that the very notion of law is contestable. The meaning of law resides in the understandings of everyone who experiences it in any of its host of forms, formal and informal. If meaning is not fixed then we can create whatever understanding of law or justice we want. On the one hand that is liberating; on the other hand it imposes a moral obligation on us not just for the specific laws we adopt but for the very notion of law we perpetuate and the kind of justice we pursue.

In short, our legal system is showing signs of wear and tear and the public is demanding an overhaul that will deliver a more satisfying form of justice at a cost they are willing to bear individually and collectively. Intellectually we feel empowered to reconsider fundamental assumptions underlying the legal enterprise we have inherited and to revisit its role in our pursuit of justice.

Once the question of justice is engaged, it admits of a host of possibilities, some yet to be imagined. To make sense of those options, we must first address the question of legitimacy. We must ask whose justice we are seeking to affirm through our inquiry.

## **WHOSE JUSTICE?**

If we are to get back to basics in our examination of justice we must get back to the basic unit of society, and re-vest in citizens the responsibility for determining what kind of justice we will have. But in doing so, we must guard against a knee-jerk, irresponsible form of direct democracy that enables people to hide from the consequences of their decisions. Rather we need forms of public engagement that promote conscientious participation in, informed discussion about, and enlightened reflection on the meaning of justice as it is played out in real life situations. We must strive for an inclusive notion of justice, one that draws from the richness of the diversity of Canadians' experiences. Moving forward on this means finding ways of engaging everyone in meaningful contemplation of the most fundamental issue we confront as a civilisation.

This may seem a daunting, if not impossible task - to be dismissed out of hand. Yet it is happening as we meet. And it is taking place in communities that seem on the surface to be least capable of undertaking it. I speak, of course, of restorative justice programs operating in some of Canada's most troubled communities fraught with some of our most intractable problems. Their experiences suggest that involving people in the real-life problems of their communities not only provides a more satisfying form of justice, but transforms both individuals and communities.

Restorative justice is not the only vehicle we have for re-imagining justice but it is a handy one since police forces are implementing this approach to fighting crime in communities all across the country. Properly run, restorative justice programs provide us not just with new forums for dispensing more satisfying justice but with new sites for advancing our understanding of justice itself. Restorative justice programs empower individuals to exercise the duties and to experience the rewards of acting as citizens in a democratic society.

As more and more people gain experience in this new form of community problem solving, we will acquire a critical mass of people who have seriously contemplated the meaning of justice in a host of situations. If their stories of justice are shared, we can generate a new body of "common law" to guide our relations with each other – a body of law in which we see ourselves and our sense of justice reflected but which transcends our time or place.

So I would propose that the most important new partner in the justice enterprise must be the Canadian public acting in their role as citizens. Unaccustomed as we are to assuming this responsibility, we will need assistance of all sorts. We will need to recapture the wisdom of the ages as known to our elders, historians, anthropologists, philosophers, religious leaders, and others who study the human condition. They too become new partners in justice as they help us find new ways of thinking and feeling about ourselves as whole beings, not just as isolated, rational, self-interested individuals. We will need their guidance in cultivating a passionate concern for the well-being of our fellows and a compassionate disinterest in the specific outcomes of the social choices we face. Moving forward means making a passion for justice the defining characteristic of Canadians!

## **WHAT ACCESS?**

If it has become critical for us to re-conceive justice at this time, it is at least a propitious time from the point of view of the availability of new mechanisms for delivering justice. Providing unprecedented communication capability, the Internet opens up entirely new ways of delivering and conversely accessing justice, indeed for effecting justice. We have efficient new ways of reducing administrative costs, managing social knowledge, and delivering justice.

The word "delivery" does not resonate well with the process of re-conceiving justice that I have been suggesting. Delivery suggests a one-way transfer of goods, in this case, justice. Someone or some institution has the job of manufacturing the goods and those goods are then dispensed to someone else who needs them. It suggests a process of consumption – someone needs justice and so goes somewhere to get it, at a price. We are reduced to the role of consumer in this transaction

as I have already noted. This is anathema to the kind of participatory justice I have been discussing.

If we are really to rethink justice, we must be open to other ways of conceiving the sources of justice. If, for example, we see justice as lodged in the hearts and minds of all of us rather than in only the deliberations of an anointed caste, then justice is effected rather than delivered. We realise justice in our interactions with each other every day. Justice is as accessible as our nearest neighbour, our teacher, co-workers – our boss! Justice is not so much delivered as it is made manifest and shared.

What we need to help us “access” this shared justice are mechanisms that liberate the impulse for justice inherent in our humanness. We must give ourselves permission to be just and to insist on justice from each other. That requires us to become more self-conscious and to take responsibility for refining our sense of justice, both individually and collectively – as Socrates said, to think each day of goodness. Living justice requires that we engage as citizens in effecting justice – not delegate that responsibility to someone or some other institution to attend to on our behalf. It also means that we pursue justice everywhere that injustice occurs – in our homes, schools, churches, streets, hospitals, workplaces... and courts.

Certain processes will be needed to bring this to pass. We will need ways of engaging with each other, of accessing the wisdom of the past, of gathering good intelligence about our problems, and of learning from our successes and mistakes. Our new delivery models will include both real and virtual, transient and institutionalised, centres of justice. They may be small and temporary clusters of community members such as we see in family group conferencing, or more fluid, self-organising learning communities on the internet. They may be permanent centres of research, study, and training or electronically delivered justice resources. Imagine learning about justice rather than law in school. Imagine consulting justice professionals instead of legal professionals. Imagine a new common law emerging as communities recover their responsibility for managing their conflicts and as their practices are examined through public reflection and debate. Imagine web sites designed to make all this knowledge and wisdom readily accessible.

New visions of justice are only possible if we are prepared to abandon the familiar for a moment and entertain alternatives, no matter how unrealistic they may seem at first. Within them may lie the germ of an idea worth maturing. In the last few decades we’ve experimented with a variety of alternatives to our mainstream legal system in the forms of alternative dispute resolution, voluntary compliance, diversion from the criminal justice system or creative processes for sentencing offenders. We have had much success with these efforts. They embolden us to move even further away from the centrifugal force of the legal system. Post modernism permits us to admit the wider experiences of the public to our understanding of law and to open up the justice enterprise to different forms and to fuller public participation. We can and should see that the differences that threaten to divide us constitute a rich pool of experiences about law that can help us deepen our commitment to justice. We can and should mobilise public discontent and transform it into active engagement in effecting justice.

If we want this renewal to succeed, we cannot simply wish it into being nor devolve it, unsupported, to the public. There is a real temptation these days for governments to hand off many of the responsibilities that we've come to rely on them to provide. Downloading and outsourcing justice will not produce the results we want. Governments will need to provide resources in a variety of forms. To do that, we may need to shift resources away from conventional legal systems and services. That is where the test of our commitment to justice will really lie and the erosion of the vision may begin to occur. It is there that we must be prepared to take our stand.

## **Conclusion**

Our legal system is in disrepute, under attack from many directions. Patchwork efforts to respond to criticisms have taken us only so far. If we are to meet the challenge of our time, we must consider new forms of access to new kinds of justice. This in turn necessitates taking on a major new partner, or rather an old one, the public. It means engaging in the very oldest tasks of citizenship: determining what kind of society we want to live in and what form of justice it will pursue. Only as we embark on this journey can we know what kind of new delivery vehicles we will need. A host of them await our use. Some may not look so new at all – public institutions that have been at hand for decades if not centuries. Others may sport the latest in technological enhancements.

If we venture this far out of the box, what would we dare to dream? Where would we begin? With whom would we choose to engage? What kinds of questions would we ask as we begin to probe the issues? What kinds of processes would help us in our inquiry? What kinds of justice might we be ready to invent?

If we take this project seriously, will there still be a place in the future for law as we know it? As we give new meaning to justice, will we give new life to the law? Is the triumph of the rule of law behind us while the pursuit of justice is forever before us? Or will we create new forms of justice within the rule of law? As we cast our eyes across our expanding horizon, what do we see?

**Diversity and Access to Justice Workshop**  
**By Prof. Brian Etherington**  
**Faculty of Law**  
**University of Windsor**

## **Introduction**

I have been asked to provide my views on how well we are doing at meeting the needs of members of diversity groups in Canadian society for access to justice, based on my own knowledge and experiences. In this brief paper I will attempt to present my perceptions of recent developments in the recognition of diversity interests and the meaning of justice and equality for members of diversity groups within our civil justice system<sup>19</sup> and the most serious problems inhibiting access to justice for members of diversity groups today. My thesis is quite straightforward. We have witnessed significant advances on the substantive side of the ledger, both in the recognition of diversity interests and the meaning of justice and equality for members of diversity groups. However, those advances on the substantive side have not been met with corresponding advances in terms of delivery mechanisms and procedures necessary to achieve access to justice. In fact, consistent with the trend among Canadian governments in the 1990's to downsize government and privatise the delivery of government services to provide tax cuts, there has been a hollowing out of government mechanisms and a significant attempt to privatise the resolution of diversity issues under human rights legislation in many jurisdictions in Canada.

The removal or withdrawal of governments from processes to resolve disputes concerning diversity cannot be a good thing for the recognition and protection of diversity interests. Diversity groups are generally minority groups, both in terms of numbers and resources. The imbalance of power between minority racial and religious groups in a market economy and the failure of our courts to adapt the common law to protect minority interests against unequal treatment led to the development of human rights legislation in the 1950's and 1960's to give governments a major role in protecting members of minority groups from discrimination in their business lives. The role of government was essential to overcome the imbalance of power which determined outcomes in the private sphere. The recent return to a reduced role for governments in the protection of diversity interests has resulted in an increasing gap between the promise and the experience of access to justice for members of diversity groups.

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<sup>19</sup> Time constraints simply made it impossible to deal with the plethora of significant issues concerning access to justice for members of diversity groups within the criminal justice system today. For some of the most comprehensive work on those issues see, Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, (1995: Queen's Printer for Ont.); Canada, *Report of the Royal Commission on Aboriginal Peoples* (1996: Canada Communication Group, Ottawa); Etherington, *Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform*, (1994) a Report Prepared for the Department of Justice, Canada.

## **The Promise: Substantive Developments in the Recognition of Diversity and the Meaning of Equality and Justice**

### ***Increasing Recognition of Diversity***

The past twenty to twenty-five years have seen a tremendous growth in the recognition of diversity interests deserving of protection from discrimination by our justice system. These developments have been the result of interaction between four agents of change, legislative amendment, judicial interpretation, the *Canadian Charter of Rights and Freedoms*, and the diversity groups themselves. The growth has come both in the area of recognition of prohibited grounds of discrimination and the definitions of discrimination and equality.

Prohibited grounds of discrimination are nothing less than those attributes of diversity which we have determined should not be allowed to be the basis of differential treatment between individuals which imposes burdens or denies benefits. By recognising a particular personal characteristic as a prohibited ground of discrimination for human rights or *Charter of Rights* purposes, we recognise that it would be an affront to our deeply held values concerning the right of all members of Canadian society to equality and human dignity to allow for the imposition of disadvantage on the basis of the proscribed ground of discrimination.

From the inception of human rights legislation in Canada in the 1940's and the 1950's we have witnessed a significant expansion of grounds of discrimination. The earliest statutes generally included only race, colour and religion. The 1960's saw the addition of age, and ethnicity or place of origin in most jurisdictions. This was followed by the addition of sex in the late 1960's and early 1970's. Marital status was added in most jurisdictions in the 1970s to be followed by family status in the late 1970's and early 1980's. More recently, disability or handicap was not recognised as a prohibited ground of discrimination in many jurisdictions until the early 1980's.<sup>20</sup> Quebec has added social condition as a prohibited ground and several jurisdictions have added receipt of social assistance as a prohibited ground for limited purposes such as non-discrimination in access to accommodation. Sexual orientation was not a prohibited ground until it was added legislatively in Ontario in 1986. This was followed by legislative addition in several other jurisdictions in the late 1980's and early 1990's, including the amendment of the federal human rights code to add sexual orientation in 1996 after many years of failed attempts.

Finally, in 1998 in *Vriend v. Alberta*<sup>21</sup>, by judicial pronouncement under s. 15 of the *Charter of Rights*, sexual orientation was added to the Alberta human rights statute and the human rights legislation of any other jurisdiction which had not included it to that point. In

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<sup>20</sup> It should perhaps be noted that handicap or disability has been the most rapidly growing ground of discrimination in terms of the number of complaints filed with human rights commissions in Canada. In 1999, 34% of all new complaints received by the Canadian HRC were based on disability. The next categories were sex with 18%, race/colour with 15% and national or ethnic origin with 14%. Canadian Human Rights Commission, *Annual Report for 1999*, (2000).

<sup>21</sup> [1998] 1 S.C.R. 493

*Vriend* and the earlier decision of *Egan v. Canada*,<sup>22</sup> the Supreme Court of Canada held that sexual orientation was an attribute of diversity that should be recognised as an analogous ground of discrimination to those enumerated under s. 15.<sup>23</sup> The Court provided a definition of analogous ground which is likely to be instructive and influential for future development of prohibited grounds under the *Charter* and under anti-discrimination legislation. The Court emphasised the notion of a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs” and urged consideration of whether persons who share the attribute of diversity “form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage.”<sup>24</sup>

### ***Evolution in Conceptions of Equality and Discrimination***

However, even more significant to the expansion of the legal recognition of diversity interests was the judicial and legislative evolution of our basic conceptions of equality and discrimination in the early to mid 1980's. The traditional meaning of equality as purely formal equality in the sense of identical treatment for all regardless of their personal attributes was rejected in favour of a new conception of substantive equality of opportunity to demonstrate one's potential without being impeded by barriers which are based on irrelevant diversity attributes or which have an unnecessary adverse impact on members of groups identified by a prohibited ground of discrimination. Under this new conception of equality it was recognised that access to justice in the form of equal treatment could often require the recognition of diversity attributes and the accommodation of differences to enable full participation free of unnecessary barriers.<sup>25</sup>

This new conception of equality required a new definition of discrimination and the Supreme Court of Canada and several of our legislatures obliged. In 1985 in *O'Malley and Ont. Human Rights Comm. v. Simpsons-Sears Ltd.*<sup>26</sup> the Court recognised for the first time that the concept of adverse effect discrimination was sufficient to satisfy a requirement for discrimination under human rights legislation. It arises where an employer for business reasons adopts a rule or standard which appears neutral on its face, and which applies uniformly to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or a group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. Thus while intentional discrimination continued to be prohibited, the Court began in the mid 1980's to shift away from a fault or intent based approach and towards a results or effects based

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<sup>22</sup> [1995] 2 S.C.R. 513.

<sup>23</sup> In addition, in *M. v. H.*, [1999] 2 S.C.R. 3 the Supreme Court confirmed that differential treatment of same sex couples in the conferral of benefits or protection under the law would constitute discrimination on the basis of sexual orientation and would have to be justified as a reasonable limit if it were to survive a *Charter* challenge. This has led to major legislative initiatives in most jurisdictions across the country to extend equal benefits and obligations to same sex couples as those provided for heterosexual couples.

<sup>24</sup> *Ibid.*, at paras. 5 and 175.

<sup>25</sup> For an influential articulation of this conception of substantive equality see the *Report of the Royal Commission on Equality in Employment*, ('The Abella Report') (Ottawa: 1984), at 2-3. This report is commonly cited as the basis for the first federal *Employment Equity Act*, passed in 1986.

<sup>26</sup> [1985] 2 S.C.R. 536.

approach to the application and enforcement of human rights legislation in Canada. A similar approach was reflected in the Court's watershed decision in *Action Travail des femmes v. C.N.R. Co.*<sup>27</sup>.

In that decision the Court defined systemic discrimination as discrimination that results from the simple operation of everyday established procedures of recruitment, hiring and promotion, none of which is designed to promote discrimination but which cumulatively are reinforced by the very exclusion of members of disadvantaged groups which results because it supports the belief or stereotype that members of the group are not capable of performing the work. Further, it upheld the granting of systemic remedial orders in the form of employment equity initiatives to obtain results in recruitment that would break the cycle of systemic discrimination. In the 1980's, some jurisdictions also amended their human rights codes to incorporate the concepts of adverse effects and systemic discrimination.<sup>28</sup>

A further significant expansion of legal protection of diversity interests in the workplace arose in the 1980's with the judicial and legislative recognition that harassment on a prohibited ground of discrimination constituted discrimination for the purposes of human rights legislation. Many jurisdictions, including Ontario, amended their human rights legislation to remove all doubt, but for those jurisdictions which failed to do so the Supreme Court settled the question in favour of protection against harassment in 1989 in *Janzen v. Platy Enterprises Ltd.*<sup>29</sup>. In addition, the theme of transition from a focus on employer fault or intent to a focus on effects on employees has been maintained in numerous Supreme Court of Canada decisions on human rights issues in the last 15 years, including decisions on employer liability for harassment by co-workers<sup>30</sup> and the relationship between the requirements of a bona fide occupational requirement and an employer's duty to accommodate.<sup>31</sup> The recent decision in *British Columbia (Public Service Emp. Relations Comm.) v. B.C.G.S.E.U.* will have a significant expansionary effect on the substantive ability of individual employees to challenge employer rules or practices which have an adverse effect as not being bona fide occupational requirements because the employer has not gone to sufficient lengths to accommodate the individual employee's diversity interests in the original construction of the business rule or practice.

The common theme of all of these developments is a greater recognition of attributes of diversity and the importance of accommodation of those diversity interests if we are to further the values of substantive equality and respect for human dignity that are central to the mission of the *Canadian Charter of Rights and Freedoms* and human rights legislation in Canada. But at the same time all of these developments significantly increase the potential for individual claims by members of diversity groups to assert that their right to substantive equality is being violated by employer practices or the conduct of unions or co-workers. To what extent have we been able to provide similar expansion or adaptation of procedures and mechanisms for protection of diversity interests to ensure that the increases in substantive rights and responsibilities are more

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<sup>27</sup> (1987), 40 D.L.R. (4<sup>th</sup>) 193 (S.C.C.).

<sup>28</sup> See for example the *Canadian Human Rights Act*, R.S.C. 1985 c. H-6, s. 10.

<sup>29</sup> [1989] 1 S.C.R. 1252.

<sup>30</sup> *Robichaud v. Canada*, [1987] 8 C.H.R.R. D/4326; and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252;

<sup>31</sup> *British Columbia (Public Service Emp. Relations Comm.) v. B.C.G.S.E.U.*, [1999] File No: 26274



than simply hollow promises?

### **The Experience: Problems in Delivery of Access to Justice For Members of Diversity Groups**

The short answer to the question posed above is that we have not been very successful in developing delivery mechanisms to meet the promise of recent substantive growth in the right to equality. How have we failed? Let me count the ways.

First, our experiments with government mechanisms to implement pro-active employment equity measures on a jurisdiction-wide basis have been largely unsuccessful to this point. Despite the willingness of human rights adjudicators to order remedial measures which include an employment equity plan to correct systemic discrimination in a few rare cases,<sup>32</sup> many believe that the most effective means of providing substantive equality in the workplace for diversity interests is to adopt government mechanisms which require employers and unions to act pro-actively to identify and remove barriers to equality of opportunity in the workplace. This led to the adoption of employment equity legislation in the federal jurisdiction in 1985<sup>33</sup> and 1996,<sup>34</sup> and in Ontario from 1993 to 1995.<sup>35</sup>

The first federal act was generally viewed as little more than a flawed reporting mechanism to track the progress (or lack thereof) of members of the four designated groups (women, aboriginal persons, visible minorities and persons with disabilities) in a small portion of the federal workforce. However, the 1996 federal *Employment Equity Act* and the Ontario legislation are generally viewed as more serious attempts to implement substantive equality on a pro-active system-wide basis. Common to both regimes are the following: the objective of removing systemic discrimination from private and public workplaces in so far as it affects four diversity groups - aboriginal persons, visible minorities, persons with disabilities and women; obligations imposed on employers to do workplace surveys to identify levels of representation of members of the identified groups for all occupational groups within the workplace and to identify workplace barriers to equality of opportunity for members of the groups; requirements for employers to prepare an employment equity plan which identifies short and long term goals to achieve representation by members of designated groups in their workforce that is consistent with their availability in the labour force and in their community, and identifies the positive measures and policies they will implement to meet their goals; provisions for administration and enforcement by a government agency with the power to do compliance audits and issue compliance orders; access to an adjudicative tribunal to challenge or enforce compliance orders.<sup>36</sup>

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<sup>32</sup> *Action Travail des femmes v. C.N.R. Co* (1987), 40 D.L.R. (4<sup>th</sup>) 193 (S.C.C.); and *National Capital Alliance on Race Relations v. Canada (Health & Welfare)* (1997), 28 C.H.R.R. D/179

<sup>33</sup> *Employment Equity Act*, R.S.C. 1985, c. 23 (2<sup>nd</sup> Supp.)

<sup>34</sup> *Employment Equity Act*, S.C. 1995, c. 44.

<sup>35</sup> *Employment Equity Act*, S.O. 1993, c. 35; repealed by *Job Quotas Repeal Act, 1995*, S.O. 1995, c. 4.

<sup>36</sup> Note that while the Ontario legislation created an Employment Equity Commission and an Employment Equity Tribunal, the latest federal act assigns the bulk of the administrative and enforcement obligations to an already overburdened Canadian Human Rights Commission but does provide for a review of Commission compliance

While it is too early to tell if the new federal act has enough teeth to make it more effective than the 1985 legislation, obviously these initiatives have had a very limited impact on ensuring substantive equality to this point. The short-lived nature of the Ontario legislation means that today pro-active employment equity schemes are only in place for less than one million workers in the federal sector (less than 8% of the population). Serious concerns have also been raised about limitations built into the Act. The legislation contains provisions which should generally protect seniority schemes under collective agreements from being held to be barriers to equal opportunity and it also prohibits the issuance of a compliance order that would have the effect of imposing a quota requiring an employer to hire or promote a fixed number of persons during a given period. More flexible numerical goals can be specified.<sup>37</sup>

Finally, this is a model for protection and promotion of diversity interests in the workplace that is very demanding in terms of resources, and some have expressed concern that, as governments seek to reduce budgetary allocations for government programs, employment equity initiatives will be funded inadequately and at the expense of other anti-discrimination programs and mechanisms.<sup>38</sup>

The failure of governments and their agencies to adopt pro-active or remedial employment equity initiatives on a more widespread basis leads us back to a consideration of how well we are doing at meeting the needs of members of diversity groups under the traditional complaint driven mechanisms. Anyone familiar with this area will know that the incapacity of human rights commissions to deal effectively with human rights complaints in a timely manner has been the subject of considerable criticism for many years now. The reports of huge backlogs of complaints and lengthy delays of three to seven years to have a complaint dealt with by an adjudicative tribunal have been the subject of academic and judicial comment since the late 1980's.<sup>39</sup> This has also resulted in criticisms from Auditors-General on occasion, particularly in the federal sphere, that human rights commissions are trying to do too many things and are taking too long to do them due to inefficient management. Over the years spokespersons for human rights commissions have pointed to increases in their jurisdiction and workload due to the substantive developments referred to above and have argued that governments have failed to provide adequate resources to deal with that workload effectively.<sup>40</sup> However, pleas for real increases in funding for human rights commissions or reforms which would enable complainants to have much more control over the processing of their complaint have, for the most part, fallen

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orders by an Employment Equity Review Tribunal under s. 27 of the Act.

<sup>37</sup> *Employment Equity Act*, S.C. 1995, c. 44. s. 33.

<sup>38</sup> See for example, Mullan, "Tribunals and Courts - The Contemporary Terrain: Lessons from Human Rights Regimes" (1999), 24 Queen's L.J. 643, at 646; and Baines, *Occupational Sex Segregation and Employment Equity: Lessons for China* (2000), unpublished manuscript prepared for the Canada-China Women's Law Project.

<sup>39</sup> For those not familiar with the extent of these problems and the difficulties it presented for access to justice for members of diversity groups protected by human rights legislation, see Ontario, *Ontario Human Rights Code Review Task Force: Achieving Equality: A Report on Human Rights Reform* (Toronto: Queen's Printer, 1992) (The Cornish Report).

<sup>40</sup> See for example the discussion in Mullan, "Tribunals and Courts - The Contemporary Terrain: Lessons from Human Rights Regimes" (1999), 24 Queen's L.J. 643, at 646.

on deaf ears.<sup>41</sup>

These problems have led to several related developments in the last 5 to 10 years that have seen a significant transfer of human rights claims to other forums for the resolution of workplace disputes. In the first place, employees have voluntarily sought to make their claims in courts or other adjudicative tribunals such as grievance arbitration or the Ontario Labour Relations Board to avoid the delay they found in the human rights commission process. In the earliest attempts by unorganised employees to go to court for relief in a civil action the bar to recognition of a tort of discrimination that was raised in *Board of Governors of Seneca College v. Bhadauria*<sup>42</sup> was used to preclude court action. However, beginning in the mid 1990's courts began to allow actions based on conduct addressed by human rights legislation to continue as long as they based their claim on the assertion of traditional causes of action previously recognised at common law and did not seek damages based on a violation of the human rights code.<sup>43</sup>

Organised employees working under a collective agreement were generally precluded by the common law from maintaining a common law action in court but many began to seek the support of unions to support their claims in the grievance arbitration process.<sup>44</sup> Arbitrators had begun to gradually accept jurisdiction to hear grievances alleging a violation of the human rights code if there was a sufficient nexus with a collective agreement provision to give them jurisdiction. In 1993 this method of acquiring arbitral jurisdiction over human rights issues was given legislative recognition in the Ontario *Labour Relations Act*.<sup>45</sup> Several other jurisdictions in Canada also give grievance arbitrators the jurisdiction to interpret and apply human rights legislation in their decision making process. Some employees also sought to escape the human rights commission logjam by applying to the Ontario Labour Relations Board under its occupational health and safety jurisdiction to claim that discriminatory conduct by the employer, such as racial harassment or sexual harassment, had made the employer's workplace unsafe due to the mental stress it put on the employee. In some cases an employee might seek relief in several forums at the same time to see which one would deal with her claim the most quickly.<sup>46</sup>

The tightening of government budgets and the push to make the delivery of government services more efficient have led to a third significant development. The human rights commissions in several jurisdictions, most notably Ontario, have adopted a policy of almost complete refusal to take jurisdiction over human rights complaints by employees who work in an

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<sup>41</sup> See for example the call by Mary Cornish for a more "client" driven process in Ontario, *Ontario Human Rights Code Review Task Force: Achieving Equality: A Report on Human Rights Reform* (Toronto: Queen's Printer, 1992) (The Cornish Report), at 108.

<sup>42</sup> [1981] 2 S.C.R. 181 (*Bhadauria*)

<sup>43</sup> See the discussion in Mactavish & Lenz, "Civil Actions for Conduct Addressed by Human Rights Legislation - Some Recent Substantive and Procedural Developments" (1996), 4 C.L.E.L.J. 375. In some cases the courts actually commented on the ineffectiveness of the human rights process as a reason for letting the court action continue.

<sup>44</sup> See *Weber v. Ontario Hydro*, *infra*.

<sup>45</sup> See *Labour Relations Act*, 1995, S.O. 1995, c. 1, s. 48 (12)(j).

<sup>46</sup> See for example the case history discussed in *3M Canada Inc. v. C.A.W., Local 27 (Chapman)* (1997), 64 L.A.C. (4<sup>th</sup>) 213 (Knopf).

organised workplace and are subject to a collective agreement. In the interests of responding to criticisms of inefficiency, in 1993 the Ontario Commission adopted a strict and rigorous policy of deferral to arbitration where the complainant worked under a collective agreement.<sup>47</sup> The Commission's guidelines<sup>48</sup> refer to the important public interest in stable and harmonious labour relations and express concerns that the human rights process should not become a tool to replace the collective bargaining process. The guidelines do suggest that the Commission should consider each case on its own basis and note that one factor to consider is whether there may also be complaints against the union. Nevertheless, recently published statistics and anecdotal evidence suggest that a refusal to process complaints submitted by organised employees has become the normal course of operations. Cases in which a decision to decline to process has been taken have tripled since introduction of the policy in 1993.<sup>49</sup>

Union counsel report that the Commission refuses to process cases when they learn the complainant works under a collective agreement, even in most cases where there is concern expressed that the union will not support a grievance to arbitration and there is a possibility of a claim against the union as well as the employer.<sup>50</sup> The justification most often offered for declining to proceed in cases where the union may not support a grievance to seek redress for discrimination or may even be a party to discrimination is that the employee may seek redress before the Ontario Labour Relations Board (OLRB) on a duty of fair representation complaint against the union. However, those familiar with the jurisprudence on duty of fair representation complaints before labour boards will know that the prospects of success on these claims are quite slender.<sup>51</sup>

The Ontario Human Rights Commission has asserted that its 1993 policy has been a great success, enabling it to get to a point where it now is able to process in a year as many or slightly

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<sup>47</sup> The Commission claims the authority to adopt this policy under the discretion given to it under s. 34 of the Human Rights Code to not deal with a complaint where it could or should be more appropriately dealt with under another Act. Note that s. 34 also gives the Commission the discretion to decline to process complaints that are trivial, frivolous or made in bad faith, complaints that are outside of its jurisdiction, and complaints that are untimely.

<sup>48</sup> Ontario Human Rights Commission, *Guidelines on the Application of Section 34 of the Ontario Human Rights Code*, (1996 - OHRC).

<sup>49</sup> "Ontario Complaint Guidelines Cause Rejection Rate to Triple" (Jan/Feb. 1999), Lancaster's Human Rights and Charter Law Reporter, Vol. 15, No. 1/2, at 3.

<sup>50</sup> Conversations with union side labour lawyers in Toronto. Some counsel have suggested that employees now frequently make complaint against the union as well as the employer in the hope that this will force the Commission to process the complaint. The suspicion has been expressed that it is the Commission's awareness of this practice that has led it to decline to process complaints even where the union is identified as a potential respondent.

<sup>51</sup> Average rates of success in B.C. and Ontario in recent years fall between 1 and 5%. There is an added problem with attempts to rely on OLRB processes to address discrimination and diversity issues under its duty of fair representation jurisdiction or its occupational health and safety legislation. Some labour lawyers have expressed the view that the OLRB is concerned, in this world of declining resources to fund its operations, that it cannot afford to have downloaded upon it the OHRC's mandate to deal with employment discrimination issues. It has itself made several rulings in recent cases that while it may have jurisdiction it should defer to the greater expertise of the OHRC on discrimination issues. See for example, *Meridien Magnesium Products Ltd.*, [1996] O.L.R.B. Rep. 964 (MacDowell) in the occupational health context. For an example of the kinds of circles that an individual employee seeking redress on a discrimination in employment claim can face see *3M Canada Inc. v. C.A.W., Local 27 (Chapman)* (1997), 64 L.A.C. (4<sup>th</sup>) 213 (Knopf).

more cases than it has opened for that year. It should be noted that the Ontario Commission has also recently embarked on pilot projects using private mediation services to attempt to help it clear its backlog of cases. In 1999 it claimed that these types of efficiency measures enabled it to resolve approximately 60 per cent of its incoming cases within 6 months.<sup>52</sup> But the question that has to be asked is what price has been paid in terms of access to justice to attain these efficiency gains?

First, there are the very obvious concerns that a three fold increase in complaints where the Commission declined to process must mean that at least some individual claimants are being denied access to any forum to protect their diversity interests from discriminatory treatment.

At the same time however, I think far too little attention has been paid to the consequences for access to justice for diversity groups of the increasing privatisation and collectivization of processes for the administration and enforcement of individual statutory and *Charter* rights. Human rights commissions are not alone in their new respect for labour arbitration as the appropriate forum to protect the most fundamental rights of organised workers. In the recent decision of *Weber v. Ontario Hydro*,<sup>53</sup> the Supreme Court of Canada held that grievance arbitrators should have exclusive original jurisdiction over the claims of unionized workers to protect their rights under the *Charter of Rights* as long as the factual nature of the dispute could be said to arise expressly or inferentially under the collective agreement. Through decisions like *Weber*, the administrative practices of human rights commissions (under statutory discretion provisions like s.34 in Ontario) and outright legislative transfers to private processes such as the 1996 amendments to the *Employment Standards Act*,<sup>54</sup> we have embarked on a trend of transferring jurisdiction over statutory individual rights claims from public officials and tribunals to private organizations and procedures - unions and grievance arbitration.

This raises several questions. What is the impact on the protection and evolution of statutory public rights of assigning the adjudication of these claims to privately appointed arbitrators whose future employment depends on the satisfaction and acceptance of the parties to a collective agreement, the union and the employer, NOT the individual or the government who one assumes are most concerned with the protection of public statutory rights?<sup>55</sup> What will be the long term effects of the assignment of responsibility for the protection of individual statutory rights to collective processes in which decisions to support claims and seek enforcement will be affected by the collective concerns of the union and all of its members? Unions and grievance arbitration are institutions of our collective bargaining regime and were designed primarily for

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<sup>52</sup> Supra, note 31 at 3, citing the Commission's 1998 Annual Report. It should be noted however that the backlog still was large with over 1200 cases that were at least 2 years old.

<sup>53</sup> [1995] 2 S.C.R. 929.

<sup>54</sup> These amendments made grievance arbitration the exclusive forum for complaints under the Ontario *Employment Standards Act* for employees who were covered by a collective agreement. R.S.O. 1990, c. E. 14 as amended, s. 64.5.

<sup>55</sup> Similar concerns might also be expressed about significant numbers of complaints that are being diverted to private mediation for resolution by mediators whose primary criterion of success may be their settlement rate and not the attainment of substantive equality or compliance with the principles and values of the human rights legislation.

the reconciliation of collective interests without undue disruption of production. Although they have some capacity to deal with individual rights issues, we must always remember that this is not their primary mission or institutional bias.<sup>56</sup> The submission of jurisdiction over the protection of individual rights and diversity interests to collective processes and institutions appears quite questionable in public policy terms, especially when one is considering the enforcement of constitutional and quasi-constitutional minority equality rights.<sup>57</sup>

## Conclusion

The concern raised by the twin spectres of privatisation and collectivisation of processes for the enforcement of *Charter* and human rights is that the tenuous balance between the values of access to justice and substantive equality and the values of efficiency and the market that is inherent in any regime for the protection of human rights will gradually be skewed in favour of the values of the market. It was this tendency of private actors and private processes to favour the values of the market over those of substantive equality and respect for human dignity that led to the call for significant intervention by public agencies to protect human rights in the post war period. We need to be vigilant to ensure that the current ascendancy of the values of efficiency and less government do not undermine our ability to provide access to justice in the form of substantive equality of opportunity for members of diversity groups. The promise of equality and protection for diversity interests offered by recent legislative and judicial developments concerning the substance of our *Charter* and human rights law has never been greater. But the realisation of that promise for many members of diversity groups is threatened by our failure on several fronts in recent years to develop appropriate delivery mechanisms for access to justice. These shortcomings include: a failure to find acceptable and effective mechanisms for the imposition of employment equity measures on a system wide basis for most Canadians; a failure to provide adequate resources for effective mechanisms to handle individual discrimination complaints under traditional human rights regimes; and a trend towards the privatisation and collectivisation of processes for resolving individual *Charter* and human rights complaints. All of these developments, with the possible exception of the first one, appear to be driven primarily, if not solely, by efficiency concerns. The struggle to overcome these shortcomings and refocus our efforts on access to justice for the protection of diversity interests will be very difficult in an

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<sup>56</sup> Of course we must recognize that collective and production interests are taken into account in resolving claims in human rights commission structures and the statutory provisions recognize their significance in the concepts of bona fide occupation requirements and the limitation of undue hardship on the duty of accommodation. But the issue addressed here is the impact of transferring jurisdiction over the role of giving meaning to these concepts to institutions and organizations that have a collective bargaining bias as opposed to a human rights bias.

<sup>57</sup> The notion that unions and employers could be placed in a position to barter the settlement of individual grievances concerning human rights or *Charter* claims in exchange for the protection or promotion of collective interests, and thereby foreclose access to any forum for consideration of those claims is very disturbing in terms of ensuring access justice. In terms of the submission of jurisdiction over *Charter* rights to grievance arbitration, Madame Justice Arbour raised these concerns in the Ontario Court of Appeal ruling in *Weber*, (1992), 98 D.L.R. (4<sup>th</sup>) 32, but her reasons were ignored by the Supreme Court of Canada.

It should be noted that most union officials are also not pleased with these developments. They recognize the concern for protection for individual rights that is raised by these developments. They are also deeply disturbed by the downloading of the costs for enforcement of human rights and *Charter* rights from governments on to union budgets that results from this transfer in responsibility.

era where the values of the market and efficiency concerns are so prominent that Canadians, or at least Canadian governments, seem prepared to tolerate the under-funding of health and education delivery programs despite the attainment of budget surpluses and significant tax cuts.<sup>58</sup>

The answer does not lie in recognising a right, constitutional or otherwise, to sue in regular courts for violation of equality rights.<sup>59</sup> Nor does it lie in assigning the functions of a government human rights commission to unions or other private collective organisations. What is required is nothing less than a recommitment to the values of access to justice for the protection of diversity interests and a search for new resources and public mechanisms for delivery that will allow us to close the gap between promise and experience. But we must be careful in considering alternative delivery mechanisms to focus more on their effectiveness in protecting diversity interests than their efficiency in clearing caseloads.

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<sup>58</sup> This comment is perhaps unfair to most Canadians as public opinion polls at the time of the 2000 federal budget found that Canadians widely favoured greater spending on health care and education as their top priorities, far ahead of tax cuts which were 6<sup>th</sup> or 7<sup>th</sup> on the list.

<sup>59</sup> Some critics have suggested this as a solution, at least on an interim basis until governments return to adequate funding for a public human rights regime. See Mullan, *supra* note 22, at 665. But this is obviously not a viable long term solution for access to justice for the majority of members of diversity groups because of the extremely high cost of civil litigation. It should be noted that there is currently a review of the *Canadian Human Rights Act* underway by government appointed task force.

## **The Role of Citizens and Communities**

**Carol McEown**

**British Columbia Legal Services Society**

**March 2000**

I have three stories that I think might help frame our discussion this morning.

In the mid-seventies, community law centres were in fashion. In the middle of the province the Gitksan and We'etsu'eten received funding to establish the Upper Skeena Counselling and Legal Assistance Society. An early staff member, in a letter for an anniversary event, recounted her initial reluctance to be part of this new organisation dealing with legal issues – there was little case law on aboriginal rights at that time and her people's experience with the law was not positive.

USCLAS offered the usual services of a community office, public legal education workshops, information, assistance and representation on non-tariff matters to aboriginal and non-aboriginal population of Hazelton. But soon it was also dealing with aboriginal rights issues. The first were hunting and fishing rights cases, and the storyteller believes that it was a fishing case that altered the perception and attitude of her people of the law and the courts. She wrote:

“This was when our fishermen took on the system and the courts to protect Gitksan fishing rights. Twenty-three charges were laid on 17 of our people and family nets had been seized. The charges were bandied about in the courts for over a year until our chiefs decided to take the system on. The nets illegally seized by the Fisheries officers were retrieved when our chiefs marched into their office, into the holding rooms and took back their nets! A judge who was instrumental in keeping the cases afloat in the court was gotten rid of when we challenged his racist comments and finally, the Supreme Court of BC assigned a judge who heard all charges in one day. The cases were thrown out of court! What a memorable victory! This was a stepping stone to developing cases to set precedent to set the stage for land claims research”

Example of a community able to use the justice system to make it work the way it is supposed to work. By successfully asserting their rights, they learned that they could use the law to promote their interests.

The community was later successful in negotiations with the provincial government to create band child welfare committees and new protocols to protect aboriginal children and keep them in their communities. This was an excellent example of good citizenship and community involvement in reforming or changing a system to benefit the community. Their actions had a real effect on the larger community, how we see aboriginal people and their claims for justice.

The second story is about the efforts of community groups to help people appearing un-represented in family courts. In the mid eighties, during BC's recession, the province and then legal aid stopped providing lawyers services to people in family court. The PLE program



produced some simple self-help publications to assist people who wanted a judge to make the decision.

People, mostly women, were turning to women's groups, court workers and poverty groups for help. The Public Interest Advocacy Centre in BC was asked by the federated anti-poverty groups to train community advocates to help people with their family court applications. A program was developed and funded, in part by the Department of Justice, to provide family court advocacy training to assist people to help applicants and respondents fill out family court forms and prepare their cases. Community groups who sponsored the training had to meet three criteria. They had to:

- 1) Demonstrate a need for the service.
- 2) Make a commitment to provide the service, including coordinating volunteer advocates.
- 3) Agree to establish an advisory committee with representatives from the family court/justice system who would be willing to provide support for the work.

There was a great demand for the training programs and most workshops were oversubscribed. The evaluations of the training sessions were very positive with participants and representatives from the advisory committee rating the workshops as excellent. Family court advocacy services were provided through community groups in 18 centers. A follow-up evaluation, two years later, found that half of the advocacy projects had moved away from helping clients to represent themselves to providing information, referral and 'emotional support'.

Two critical elements were needed to make the project work. The community group sponsoring the program had to have stable funding, sufficient resources to manage the program and credibility in the community. As well, it needed one person in the family justice system as a partner. Without staff and community credibility, it could not maintain the services. Without the support of someone in the system, it was too hard to continue to provide the service. Clients weren't referred, their work was challenged, backup wasn't available.

We have now experienced our umpteenth study of civil justice, especially family law matters. Again, as in the early 80's people have asked for the law to be clear, alternatives, such as mediation to be available, and that the legal process be kept simple. What we have now is a system so complex, so fragmented it is crazy making. Mandatory parenting programs, mediation, child support guidelines, case management, case conferences, complex rules reduce peoples' access to the legal system.

Again, as in the early 80's we have reduced publicly funded legal services for family law matters. This time the explanation is not just containing costs. The rhetoric is not about options but about showing people how to do the right thing, be good parents, not fight about money, be understanding.

And again, we have been asked by community groups and others to develop self-help publications and training. The 12-page booklet has become 60 pages, the financial form has

grown from 2 pages to 10 pages. The rules are much more complex forcing people through many doors and forums before they can ask a judge to make a decision in their matter. What could have been made simpler, with the notion of the child support guidelines has become a maze.

How does this happen? Is it lawyers continuing to make the system more and more complex so that they will continue to maintain their role? Judges trying to keep unrepresented people out of their courts or making sure that their time is used wisely? Bureaucrats trying to implement policies that capture the current thinking of academics? Politicians responding to proposals of interest groups (also known as the community)?

What seems to be missing from all of this is any kind of cooperative effort that recognizes and respects the individuals trying to get help with a problem that they and the government have clearly defined as having a legal solution.

The new youth justice reform initiatives are another opportunity to work with the community and create new partnerships. I attended a meeting to discuss the new youth justice initiatives last month. At that meeting, we were told that British Columbia was much further ahead of other provinces in introducing restorative justice programs for youth. These programs were community-based, solutions oriented intended to keep youth out of the court system while helping them to be accountable and take responsibility for their actions.

When asked where the money would come from to support the programs, we were told these programs could save money. All the community needed to do was convince corrections and the provincial government to use less money for lock-ups and put it into alternative programs. When I spoke to the province, the response was that if the programs were funded, they would no longer be true community initiatives.

At my next meeting with some teachers and youth workers, I heard stories of kids who would have never been charged, agreeing to 'sentences' that were very punitive. They didn't know they had a choice, nor was their community represented in the panel. I heard from community workers who wanted to know where the resources would come from to provide the services that were needed to help youth at risk stay out of trouble, and become responsible members of society. The questions that need to be addressed are the ones that we have raised in earlier stories.

1. There are many communities. Where is the venue to discuss the different views of justice and to learn about other ways to provide justice?
2. Programs developed by one community may not be appropriate for another. Alternative dispute resolution models or restorative justice are seen as the new saviors of the justice system.
3. How do we get the justice system to share its power and its resources?

## **The Judgement of Wider Courts**

**Gilles Paquet  
Centre on Governance  
University of Ottawa  
March 31, 2000**

If you only have a hammer,  
everything looks like a nail

Anon.

### **Introduction**

As most commentators would agree, access to justice is part of any just society. This does not only mean either access to the justice system (if by justice system one refers exclusively to the courts as usually understood i.e., the formal courts of law) or access to law and the formal legal apparatus. Justice is a much broader concept. In order to connote this broader concept of justice (while not sinking the notion of justice entirely into a philosophical swamp), I will use the expression wider courts. It may be neither the most elegant label nor the most enlightening, but it will serve our purpose here.

The March 31, 2000 symposium of the Deputy Minister of Justice of the Government of Canada was entitled *Expanding Horizons: Rethinking Access to Justice in Canada*. It focused on the emerging challenges facing those who wish to ensure that Canadians have access to justice (in this broad sense mentioned above) in an increasingly complex environment.

This is not the first time that the issue is examined in Canada. Steven Bittle (2000) has reviewed the previous Canadian conferences and symposia on this theme in a background document for the present symposium. But the March 31<sup>st</sup> symposium was meant to be of a special nature from its inception. It was launched with an unusual invitation by the Deputy Minister to explore the concept of access to justice beyond its traditional boundaries and into wider courts so to speak. Morris Rosenberg, the Deputy Minister of Justice, called on the participants to go outside the box and to use lateral thinking in developing strategies for better ways to provide access to justice for Canadians.

This invitation to self-subversion by the legal establishment (indeed the establishment constituted a significant portion of those participating) was surprising for some. The *confrérie* of lawyers and law professionals is traditionally very conservative. It is also perceived as being quite defensive when it is accused, as the professional group at the core of the formal system, either of not doing enough or not doing the best of all jobs in providing optimal access to justice for all Canadians. The exhortation to explore widely extra-murally and to roam freely over a much wider territory than the traditional courts sounded subversive.

## A Multi-voiced Challenge

The first session of the symposium was meant to provide the participants with a sense of direction in their search for new strategies for optimal access to justice by Canadians. The multifaceted message that emerged from that session might be summarized in a few words: the record of Canada on the matter of access to justice may not be as enviable as is usually believed. Another way of putting this central message (coming from two eminent jurists and an astute observer of the law/justice scene) is that the “fortress” of the formal justice establishment as defined by the traditional courts is not impregnable, that there even is “*péril en la demeure*” when one examines carefully the “house of justice” in Canada.

This situation is ascribable in part to the challenges mentioned by Mark Kingwell (2000) in his essay prepared before the symposium: growing population diversity, globalization, changing political/cultural interface, new role of technology, and new forms of citizen action. But the core of the messages put forward during the introductory session went much beyond simple warnings that the world has become more complex.

Judge Turpel-Lafond (Saskatchewan) issued *a message of anxiety*: the justice system may not serve the community well. What is in place for Aboriginal groups, for instance, is more akin to a **prison industry** condemned to a recycling of deviants. Even though there has been a certain highbrow intellectual interest in restorative justice, it has not translated into meaningful action on the front line. From the vantage-point of a Western Canada judge, the fortress is seen as inadequate.

Roderick Macdonald (Law Commission of Canada) issued *a message of disconnection*. He reflected on the chasm between “the official system” (the formal system of lawyers, courts and formal justice) and the real ‘living law of everyday human interaction’. Acknowledging the Kingwell/Turpel-Lafond diagnosis that, as human interaction becomes more complex and takes different flavors, official justice disenfranchises more and more the ordinary person, he concluded with a plea for more opportunities for citizens to participate more fully in the justice system or more precisely in the lawmaking process.

Jacques Dufresne had *a message of denunciation*: for him, the formal justice system is the source of the problem. The formal judicial institution, the fortress, is preventing the normal carrying of justice. Instead of preventing problems, the “official system” is aggravating the problems and may even be the source of injustice. The lack of preventive justice to avoid recourse to the formal system is seen as a major gap that prevents citizens from having access to effective justice. This led Dufresne to suggest that a “justice douce” (in the sense that one talks about *une médecine douce*) might be in order and he illustrated the ways in which such a process would work by making reference to the preventive work of notaries in the Quebec justice system.

The message was loud and clear: the formal justice system is failing in providing adequate

access to justice for Canadians. Whether the failure is mainly an upstream phenomenon (i.e. as a result of inadequate preventive justice), in the stream *per se* (i.e. as a result of the disconnection between the official system and real-life human interaction) or downstream (i.e. as a result of a simple “gotcha” approach of the formal justice system and the lack of any serious commitment to restorative justice), it is clear that the official system is failing the citizenry.

The first plenary session did not suggest that these three perspectives on the ways to improve access to justice by more prevention, by better connection, and by more restorative work were the only ones. Indeed, sprinkled in the three papers, there was reference to parallel and alternative processes that were already providing justice outside the formal system. These broad-ranging and at times provocative statements set the stage very well for probing debates and imaginative inquiries. They launched a symposium that promised to live up to the expectations of the Deputy Minister, and could be expected to come up with creative ways in which access to justice might be improved.

### **The Fortress, the Barbarians and the Plumbers**

Following the introductory plenary session, the symposium participants were spread out in four parallel workshops to pursue the search for alternative and improved ways to ensure better access to justice. These workshops were meant to bring together participants from all walks of life (from inside and outside the formal legal system). The final assemblage of participants turned out to be (not as a result of the pattern of invitations sent out but as a result of many persons being unable to attend because of previous commitments) permeated by officials of the formal justice system to a greater extent than had been anticipated. But there were still a significant group of non-lawyers representing a variety of non-formal-system perspectives in attendance at the symposium.

The first three workshops were constructed around the concerns of groups outside the fortress of the formal justice system: (1) the citizenry and communities, (2) the diversity of groups making up the Canadian social fabric and those concerned with their welfare, and (3) the economists who have a perspective on the justice system quite different from the lawyers. The fourth workshop was focused on the examination of alternative instruments and partnerships that might be used to improve access to justice.

I refer, somewhat lightly but not unkindly, to these groups outside the fortress of the official justice system involved in the first three workshops as the Barbarians because of the fact that the “insiders” in the formal justice system (very much like the Romans vis-à-vis the Ostrogoths and the Visigoths) are very much in the habit of regarding the “outsiders” as being *different in kind*.

The first three workshops were designed on the assumption that the best way to expand the horizons of the inhabitants of the fortress is to invite these different groups of outsiders to comment on the rationale for the existence of the fortress, on the work of the fortress, on ways to invade the fortress, on its relative importance, on the reasons to want to be inside, etc.

The lay community (whatever it might be) often feels a strong sense of exclusion and feels at

times that it is regarded by many in the official system as somewhat irrelevant, or tediously tiresome. Yet, there is also a strong feeling that the lay community and the citizenry in general should participate not only in the process of lawmaking, but in the process of production of justice. So, one could have expected major challenges to be mounted by the Barbarians when invited to visit the fortress.

However, this outburst of passion and denunciation did not materialize. Tact and civility prevailed, to the point that passion did not appear strongly in the debates in the workshops, at least not visible or audible to the external observer migrating from session to session. Debates were informative and informed, but one did not see emerging from these debates emotional attempts to put forward major proposals designed to reframe the “access to justice”. What evolved was a serene discussion of many aspects of the complex questions of how citizens and communities might get involved, of how the new Canadian diversity can be taken into account, and how economic dimensions of justice should be handled.

The fourth workshop was dedicated (at least from a preliminary look at the program) to more mundane matters of fine-tuning of the existing system (plumbing issues one might say lightly but not unkindly) even though it mentioned partners and alternative delivery mechanisms. This fourth group took the mandate it was given to heart and was surprisingly subversive. It is as if this work within the confines of the official system (or at its immediate periphery and within the logic of the fortress) allowed participants to explore less self-consciously the boundaries beyond which one might want to go.

### **Echoes from the workshops**

It is difficult to reconstruct the full texture of intelligent, rich and informed conversations for someone who hopped from session to session. It is not unlike trying to reconstruct a snowstorm from the dew of the few flakes that melt on our face (John Updike). One is bound to be selective and therefore partial of necessity in such circumstances. However, since the reports of careful note-takers will be available, my idiosyncratic summaries might be easily corrected if they turn out to be misleading, would therefore do little harm, and yet might help to underline some basic themes deserving special attention.

#### **(1) Citizens and communities**

It was clearly agreed to by participants that there is a role for citizens and communities in the justice system. The debate centered on the difficulty in defining community, in operationalizing the roles of citizens and communities, and in ensuring that the requisite infrastructure needed for the citizens and communities to operate effectively in a world (1) where the courts are not the only forums the citizens need to access and (2) where circumstances are such that a “one size fits all” strategy is not useable, would be put in place.

This process of inclusion was perceived as being particularly difficult to engineer by citizens and communities: it is not easy to use “the system”. It was perceived largely as a problem of power sharing in which the formal justice system is not willing to share much.

The discussion was focused on civic engagement and the possibility of building bridges enabling communities to play a greater role within the institutional order. Obstacles in the form of inter-jurisdictional squabbles and professional turf-defense were discussed. The focus was mainly on ways to open and reshape the existing formal system to accommodate some input from citizens and communities.

## (2) Diversity

The formal system has given recognition with particular force to the argument of access to justice through equal treatment. There has been some “judicial progress” on this front. But it was found that the formal system has not been very successful in developing delivery mechanisms to meet the promise of substantive growth in the “right to equality”. Indeed, the processes of privatization of the adjudication of claims (by arbitrators) and of the collectivization of the processes (dealing with groups not individuals) have been seen as an erosion of the public rights basis of human rights. Moreover the argument that these initiatives have efficiency costs has led many to call for some measurement of the impact of these initiatives if one wishes to ensure that the substantive equality rights strategy is maintained.

The challenge of diversity has been posed almost entirely in terms of substantive equality rights and of some sort of accountability for implementation to the minority groups. Surprisingly, in the discussion, diversity was not used in utilitarian terms as connoting a source of dynamic efficiency in modern socio-economies and polities. This is an argument one often hears about pluralism. Rather the term “diversity” was used almost exclusively as a public value standing in contradiction with efficiency. This was surprising and (together with the focus on substantive rights) limited considerably the scope of the inquiry.

Reference to Aboriginal groups and to minority groups underlined the new forms of accountability to minorities generated by the formal system of justice, and led to explorations of the impact and import of the effectiveness of the measures to promote access to the formal justice system.

## (3) Economics

Economists and lawyers are often at odds when dealing with justice. Economists have a rational model of the world and a central concern for efficiency. Moreover, the profession has a strong taste for measurement. In dealing with the justice process, economists have therefore applied their rational model, have celebrated the primacy of efficiency, and urged all concerned to quantify outcomes.

The study of legal aid programs has been used to illustrate the unfortunate consequences of a world without outcome measurements, but the focus of discussion was the process of resource allocation within the justice system. The argument made by economists is that outcome and impact measurements and evaluation studies can help to determine where the resources would have a more potent impact, and therefore should determine where the resources are allocated.

The case for the importance of research and measurement in determining resource allocation within the justice system is obviously strong. Moreover, the suggestion that outcome measurements may serve as surrogate numbers for what the price mechanism reveals in the private sector is reasonable. However, the temptation to ascribe too much potency to the rational model or to lionize quantophrenic exercises was not always altogether avoided in the debates.

#### (4) New mechanisms and partners

The richness of the debates around the exploration for new mechanisms and partnerships in the delivery of justice was both surprising and yet predictable. The relatively secure boundaries of the debate that was deeply rooted in efforts to improve the existing system (not challenge it) led in fact to interesting probings much beyond the original mandate.

It all started with the need to define some rationale for the need to improve the justice system and some benchmarks by which it might be said to have been improved. This led to an exploration of the type of society Canadians want, and consequently of the type of justice it may wish to have.

It was recognized from the very beginning that the diversity of the Canadian population, and the unequal distribution of income and wealth but also of access to power, made it impossible to accept that a one-size-fits-all system would work. It was felt therefore that there is a need (1) for an agreement upstream on some basic principles, a sort of Magna Carta B that would guide the exploration, and (2) for an acceptance that it would be through “local justice” (i.e. an effort to work at the level of the different groups, disputes, issues, etc.) that one can expect to fine-tune better practices, and not through broad-ranging accords (Elster 1992).

The whole notion of culture of justice was debated, the difference between criminal and social justice, the pros and cons of a strict and simple reliance of the rule of law, the tyranny of majority rule, etc. New partnerships and new mechanisms were defined as having to be sought within this dual set of constraints of broad principles and local settings (Foblets 1996).

#### **A few roads less travelled but...**

A few points were mentioned in each workshop like the need for more resources, even though some insisted that what might be required is also different types of resources. A case in point had to do with the new type of resources that restorative justice might require. The Elders, imposed upon by the community in the context of restorative justice, may very well develop a certain fatigue when the same persons are time and time again used by the process. This can only lead to the initiative falling out of grace.

But many points made forcefully at one moment or another in the discussions fell like a lead balloon, for one reason or another. Some of those would appear to deserve at least some mention in the proceedings of the symposium.

1) The first one has to do with the basic inertia of the formal justice system. In the same manner



that economists accept to speculate on a world without a Bank of Canada, it should be possible to speculate on the impact of some drastic reform or reduction of the formal justice apparatus. It is not in good currency to do so. This entails that many aspects of the formal justice system avoids serious scrutiny. For instance, the inflation of formal laws and regulations has generated an increase in courts activities galore. It might be worth exploring whether this expansion of the formal justice system has in fact increased or decreased the production of true justice in this country. Some have argued that the invasion of society by the “rule of law” as interpreted by courts may indeed have reduced the access to justice for Canadian citizens. The case made by Jacques Dufresne for a “justice douce” would call for a much-reduced role for the courts.

- 2) The second point pertains to the importance of the financial aspects of the formal justice system. A system is made of a structure (a set of roles), a technology (some instrumentalities), and a theory (a sense of what the system is there for). The most effective way to destabilize the system and transform it may indeed be to modify its technology (Schon 1971). One may therefore ask whether it would not be important to tinker with the financial technology of the formal legal system. The fee-per-act remuneration in the health care system has had dramatic consequences on the structure of the sector. In the same way, the manner in which one remunerates lawyers can only have an impact on the practice of law and on the way in which citizens access to law via them. Consequently, any attempt to reform the formal justice system might require a modification of the financial infrastructure on which it is built. In the case of medicine, it is felt that only when one is seriously exploring the possibility of repealing the fee-per-act system can the industry be transformed. Comparisons between the Blue Cross system and the Kaiser systems in New York have revealed that the mode of remuneration may impact dramatically on the efficiency (doing the thing right) and the effectiveness (doing the right thing) of the industry. Indeed, the refusal to focus on “wordily” aspects of the justice system like remuneration may indeed prevent real change (Paquet 1994).
- 3) The third point deals with the “rights and entitlements” focus of the justice system as it exists in the formal legal structures. This stands in sharp contrast with the “needs-based claims” of the citizens: the need to ensure that one can walk safely at night in our cities, the need for a divorce that will not cost \$100,000, etc. It may be argued that the focus on rights has led the system either to ignore needs, or to regard rights as the only way to ensure that the needs for justice are met. In fact, there are all sorts of other legitimate problem solving mechanisms that come to mind and all sorts of new actors that appear useful when needs are becoming the focus of attention. Indeed, the purpose of the real justice system is to eliminate servitude, to attenuate unfreedoms. A needs-based approach may contribute significantly to eliminating the pro-courts or pro-formal justice system bias of the rights approach. The very creation of many wickets where citizens could find alternative ways to resolve their problems or satisfy their needs would do much to increase their freedom.

### **A few paradoxes**

The many pressures being brought to bear on the justice system and the call to arms to ensure

access to justice have compounded in ways that have led to some paradoxical situations. A paradox is a statement apparently self-contradictory. It is often the most important source of renewal since it calls for issues to be re-framed in order to avoid the contradiction.

The first paradox that struck observers at the symposium emerged, on the one hand, from the central recognition by most of the participants that in the carrying of justice there is no one-size-fits-all and that therefore issues must be resolved locally. On the other hand, the whole philosophy of rights has its basis in substantive equality. It is difficult to see how this call for substantive equality and sameness can be reconciled with local justice or different standards being applied according to circumstances. This paradox strikes at the heart of the formal justice system and challenges its present incapacity to provide the requisite amount of casuistry. Indeed, this is a paradox that is ever present in the Canadian context. Quebec has found it impossible to get the rest of the country to allow it to be equal but different, because as soon as one invokes *le droit à la différence*, this always strikes the opponent as tantamount to requesting a favorable or preferred treatment. Equal but different is however exactly what would appear to be the foundation of the new flexible system based on local justice, or the acceptance that there might be various windows to give access to justice.

The meta-level at which a paradox like this one can be resolved is one in which the equal but different is transformed into something like different but united. It suggests that there are ways to secure compromise and flexibility so as to have broadly agreed general principles (Magna Carta) and decentralized adjudication through different mechanisms and via different channels (local justice). The challenge of generating such meta-solutions will be an important one for jurists. Indeed, one of the value-adding contribution of the symposium has been to put such a paradox front-and-center and to suggest that it must be resolved if one is to be able to define workable conditions for an improved system of justice that would allow a requisite variety of access points and avenues or channels through or around the Fortress.

The second paradox is equally daunting. It suggests that the call for inclusion and participation in the justice process may challenge some fundamental features of representative democracy. Indeed, this sort of intervention in the judicial process (upstream in the case of preventive law, in the stream more directly or through alternative legal avenues, and downstream in the case of restorative law) challenges the usual democratic method of electing representatives or choosing officials, and then allowing them to take the decision for the collectivity.

The very participation in the justice process that is requested would appear to challenge the validity of the process of representative democracy that has generated and supported the existing legal order (Hermet 1997). Indeed, participation and inclusion are often seen as short-circuiting due process, as potentially derailing the normal ways.

It is unlikely that this can be resolved without a very serious reinterpretation of the very notion of representative democracy and of its legal institutions. Again, this is a challenge that the symposium has raised for the jurists to tackle, and one that calls for much creativity.

## Conclusion

It is unwise for a rapporteur (however much freedom he has been granted in the dispatch of his functions) to use more air time than the palavers he is supposed to report on. So allow me in closing to mention some conclusions from the symposium deliberations. These conclusions are of necessity idiosyncratic since I could not be everywhere, but they should serve as a set of hypotheses that might be used to validate one's own experience or in reading the detailed reports of the workshops note-takers.

It would appear that in order to improve access to justice, one might very usefully do a number of things in the short run.

First, it was clear that the development of an improved justice system (that would go much beyond the formal one and that would provide improved access to justice for the citizens) depends on an agreement about the sort of society we want and the sort of justice we want. It is important to bring forth such a Magna Carta defining loosely these values for only such a statement can serve as a sextant in the exploration of the different ways in which citizens should gain access to justice, and in the definition also of what is and is not acceptable.

Second, it was also clear that one cannot explore the different possible alternative mechanisms or alliances with other groups in defining an improved system of access to justice without a better knowledge of what experiments have been conducted, and with what degree of success, in Canada or elsewhere. Such a catalogue does not exist. It would appear crucial to ensure that it is prepared forthwith.

Third, there must be an explicit effort to encourage the maximum amount of experimentation and innovation in the development of better access to justice. This can be done however only if there is a change in the culture of the justice system. This in turn can only be effected as a result of explicit effort to pro-actively promote, foster and support innovation by the senior officials of the Law Commission and of the different departments of justice acting in concert. In a way, the symposium might be seen as Phase I in the process of development of the necessary cultural support for the exploration and search for better ways to continue.

These shortcuts may appear of limited import, but they are meant to prepare the way for more fundamental changes in the long run.

First, the combination of a loose statement of the Canadian philosophy of justice, a more complete catalogue of what works and does not work, and a pro-active support of innovation will tend to generate the emergence of basic national principles that may be of greater use in the development of a new architecture of more accessible justice institutions than a vague Magna Carta.

One could do worse in the definition of these national principles than to start with the suggestions of Amartya Sen who has put at the center of the whole process of social, economic

and political development the freedom from different servitude or the elimination of unfreedoms due to lack of political margins of maneuverability, of social opportunities, of economic possibilities, and of transparency and security guarantees (Sen 1999).

Second, one has to strive for the establishment of a *distributed justice system*, a system where justice is available in a variety of forms, from a variety of sources, and through a variety of channels, so as to ensure that the citizen has a true access to justice. This is truly Phase II in the process of development of a new culture of access to justice. Already, the road to distributed governance has been explored (Paquet 1999) and it has been shown that it generates higher performance. The governance of the justice system needs to follow the same path.

But this drift toward a different justice system that is more distributed is unlikely to be smooth. The reason for this is simple: such a road is likely to be fraught with difficult times, but also with setbacks and mishaps. So, in the long run, one must also be able to ensure the requisite “negative capacity” (as Keats would call it), i.e., the capacity to keep going when things are going wrong. A third long-run initiative therefore entails the construction of the necessary support systems to help the reformers both in taking a creative part in this multilogue with the citizenry and in withstanding the chilling effect generated by setbacks in any change venture of this sort. For without such support system, reform is doomed.

Roy Lewis has analysed this sort of situation in a satirical mode in his famous *What We Did to Father* (1960) in which he portrays the experience of evolution of a community of tree-dwelling apes discovering fire, inventing tools and being carried forward by progress away from the security of their trees. In such a transitional world, every unfortunate turn of events is always an occasion for reluctant participants to denounce progress and to seek to launch a “back to the trees” movement.

One may reasonably anticipate that every setback in this massive transformation of the justice system will trigger another version of the “back to the tree movement”. It is therefore crucial that there be ways to immunize the justice system against such setbacks. This is one dossier where the justice system may have to turn to non-jurists for help.

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## APPENDIX C

**Ms. Cherry Kingsley from Save the Children-Canada** wrote the following letter. Due to prior commitments, Ms. Kingsley was unable to attend the Symposium. She therefore requested that her letter be included in the final Symposium report as a way of providing voice to sexually exploited children and youth in Canada.

Dear Mr. Rosenberg:

I am writing this letter as I am unable to attend the “**Rethinking Access to Justice**” forum, being hosted on March 31<sup>st</sup>, 2000.

I am deeply disappointed that I cannot attend because “access to justice” is an issue facing commercially sexually exploited children and youth in Canada daily. I am currently touring across Canada consulting with sexually exploited Aboriginal youth in rural, on-reserve and urban communities, and unfortunately March 31<sup>st</sup> is the date of the talking circle that I am facilitating in Toronto. Within the transcripts of the talking circles are hundreds of young people’s stories reflecting the experiences of hundreds more. Because I am not able to share all of their stories in this letter, please contact me for transcripts.

I would like to reflect on what the youth have been telling me about their needs, with the hope that the information will be helpful to your discussions. I hope this information can be shared with the other participants and considered in your outcomes. I would feel badly if the only reason their voices went unheard was that I wasn’t able to attend.

I want to tell you a little about myself first. I am from the Sewepmec Nation in central British Columbia. I am currently employed by Save the Children-Canada as the manager for **Out From the Shadows and Into the Light**, a national project to address the commercial sexual exploitation of children and youth in Canada. This issue is of utmost importance to me, as I was involved for eight years in the sex trade in Canada.

I became involved in the sex trade at the age of 14. I grew up in a very abusive home with my mother and stepfather. Everyday there was alcoholism, neglect, violence and sexual abuse. The first time I ran away I was five years old, hiding in the backyard because I didn’t want to go home. There were many, many times the police were at our house because of our parents fighting. They would ask my parents to quiet down because they were disturbing the peace, look at my sister and I, and leave. Once, in the middle of the night I asked a neighbour for help, only to be sent back home. I even asked a teacher once for help. She phoned by mother and when I got home I was beaten. I never again asked for help from a stranger.

When I was ten, I was put into state care in Calgary. My sister and I were immediately separated, and what followed was a series of 20 placements. I lived in foster homes, receiving homes, assessment homes, shelters and secure care. While moving around was painful, the shame and stigma of being a “welfare kid” felt worse. It was clearly understood and articulated that people

in the community didn't always like group homes or foster homes in their neighbourhoods, and many of them didn't want us to associate with their children. I never felt that I could talk about my abuse, loneliness or feelings with anyone. The only friends I had were an older couple.

On reflection, there was nothing really special that they did to entice me, no promises of money, glamour or parties. Instead, they just used to hang out with me, and they would listen to me. Sometimes we would go for coffee or a movie, and when I didn't want to go home (or wherever I was living), they would let me stay with them. When I was fourteen, they asked me if I wanted to go to Vancouver with them. They said they would take care of me, that I could go to school where no one would know me and know that I was abused or in care. Of course I went with them. All I ever wanted was to just leave all of that behind.

The night we arrived in Vancouver they told me they only had money for one night at a hotel and that I would have to go and "work". I didn't really know what they meant other than what I had seen on television. I didn't understand what I was really going to have to do. "Working," meant standing on a street corner, sometimes eighteen hours a day, sometimes more. Sometimes there was eight clients a day, ten clients, sometimes more. I wasn't allowed to keep my money, and often didn't even have enough change for coffee. I was beaten almost every day, both by my pimp and by my clients as well. When I was standing on the street corner, people walking or driving by me would yell, call me names and throw things at me. Police harassment was frequent. I was afraid to ask for help. Because I had run away I thought that I would be the one in trouble. By fifteen, I was working for a bike gang and had a cocaine and heroin addiction. I stayed entrenched in this life until I was twenty-two.

When I began to heal, I was able to change my life. Healing consisted of many things. Having somewhere to go, finding my voice, and connecting with my First Nations culture. All were, and are, of fundamental importance not only in surviving, but also in truly beginning to heal. For me personally, healing means living in the same world that has abused, neglected, exploited and abandoned me while something in me changes. Through the invitation of community and state services, I am given the opportunity, resources and support not just to survive, but thrive. I am allowed to shine.

Maybe that is justice.

Maybe justice isn't always pointing fingers, making somebody "pay", punitive, or a form of vengeance. Although when you read the papers or watch t.v. you begin to believe that's what justice is. Maybe justice is being allowed to survive and thrive. Being allowed to give voice to who or what is hurting you. Young people told me when I asked them to define abuse, "when somebody hurts you, not to teach you right from wrong or to teach you anything, but because they want to hurt you, whether it is mental, physical or sexual." I had never seen abuse defined that way before. Another youth said that abuse is any thing that hurts so much it limits you in the world, physically, mentally, emotionally or sexually.

If we are struggling to make justice accessible, we have to agree about what justice is. We have

to recognise some of the fundamental injustice in our country, and in our communities. Young people don't want justice to mean pain, punishment, vengeance, retribution, "making somebody suffer or pay", finger-pointing, shaming or "locking them up and throwing away the key". Most young people that I talk to want food and shelter, protection from violence and abuse, and the support necessary to education, employment, happiness and healing. To the youth I talk to, that is justice.

I know that people look to the courts for justice, and for fairness in administrative and due process. But young people are looking to their families and to their community for justice. I was in a community that has per capita the highest suicide rate of teens in the world. In Canada. There was a girl who had been brutally sexually assaulted, and when she disclosed, she was treated with hostility not only by the police, defence counsel, and the courts, but by the whole community. I know that everybody always hears stories like that. But, she wrote a poem, and there was a line that said, "Do I die, or try to live long enough to see justice" If we don't at least talk about justice, some of our children will die, without ever having known or seen justice.

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